Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

PATRICIA L. CARUSO, Director of Michigan Department of Corrections; MICHIGAN DEPARTMENT OF CORRECTIONS

Petitioners,

v

MICHELLE BAZZETTA, et al

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff in a 42 U.S.C. § 1983 action may retain disputed interim attorney fees awarded during the pendency of the litigation when the plaintiff – having lost on all claims in a merits decision by this Court – is plainly not a "prevailing party" under 42 U.S.C. § 1988(b)?

PARTIES TO THE PROCEEDING

Petitioners are the Michigan Department of Corrections (MDOC) and the Director of the Michigan Department of Corrections and its Director, Patricia L. Caruso, who is automatically substituted as a party in place of the former Director, Kenneth McGinnis, pursuant to S. Ct. R. 35.3.

Respondents include eleven class representatives on behalf of themselves and all others similarly situated, including all inmates incarcerated by MDOC and non-incarcerated potential visitors of MDOC inmates. The eleven representative plaintiffs are Michelle Bazzetta, Stacey Barker, Toni Bunton, Debra King, Shante Allen, Adrienne Branaugh, Alesia Butler, Tamara Prude, Susan Fair, Valerie Bunton, and Arturo Bunton, through his next friend, Valerie Bunton.

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OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit was entered on August 28, 2008.[1] The Court of Appeals affirmed the order and judgment of the United States District Court for the Eastern District of Michigan entered on November 20, 2006, which dismissed the case with prejudice. But the Court of Appeals denied Petitioners' motion to vacate an earlier order awarding interim attorney fees to Respondents.[2] The Court of Appeals denied Petitioners' Motion Rehearing and Suggestion for Rehearing En Banc in an unpublished order entered on December 11, 2008.[3]

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] *Bazzetta v. McGinnis*, (unpublished opinion, 6th Cir. Nos. 06-2643/2644, August 28, 2008; Pet. App. 1a-9a.)

[2] *Bazzetta v. McGinnis*, (unpublished order, ED Mich No. 95-73540, November 20, 2006; Pet. App. 10a-14a.) That order denied Petitioners' request to vacate a June 27, 2002, order for payment of interim attorney fees, Pet. App. 10a-14a; and granted Petitioners' request to vacate an August 19, 2002 order granting Respondents' attorney fees, Pet. App. 10a-14a. On that same day, the District Court entered a judgment dismissing the case with prejudice. *Bazzetta v. McGinnis* (E.D. Mich. No. 95-73540, November 20, 2006; Pet. App. 151a.)

[3] *Bazzetta v. McGinnis*, (unpublished order denying rehearing (6th Cir. Nos. 06-2643/2644, December 11, 2008; Pet. App. 15a-16a.)

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 1988(b) provides:

> In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or section 40302 of the Violence Against Women Act of 1994, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

STATEMENT OF THE CASE

1. This Court's decision on the Merits

This is a fourteen-year-old controversy brought by Respondent incarcerated felons and their visitors against Petitioners challenging prison visitation restrictions. Respondents initially achieved some injunctive relief from the District Court and the Court of Appeals,[4] but

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[4] *Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir. 2002).

ultimately lost on every claim. In *Overton v. Bazzetta*, this Court unanimously reversed the Court of Appeals and held that the challenged prison visitation restrictions did not violate the First, Eighth or Fourteenth Amendments to the United States Constitution.[5] After further proceedings in the District Court and the Court of Appeals, a judgment dismissing the case with prejudice was entered on November 20, 2006.[6] Respondents did not appeal the dismissal of their case with prejudice. Thus, the end result is that, Respondents lost on every claim, on the merits.

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[5] *Overton v. Bazzetta*, 539 U.S. 126 (2003). Rather than repeat the lengthy and complex procedural history in this case, Petitioner MDOC relies on the factual and procedural background set forth in *Overton, supra*.

[6] In response to this Court's unanimous decision on August 28, 2003, the Court of Appeals vacated its decision affirming the District Court's April 19, 2001 findings of fact and conclusions of law, *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813 (E.D. Mich. 2001), and remanded the case back to the District Court for further consideration in light of this Court's opinion. Pet.App. 59a-60a. Despite this Court's unanimous decision in Overton on December 23, 2003, the District Court issued an opinion and order agreeing with Plaintiffs' claim that MDOC's visitation restriction for inmates found guilty of substance abuse misconduct violated the procedural Due Process Clause of the Fourteenth Amendment, and held that it was still valid. Pet. App. 102a-118a. Petitioners appealed and, the Court of Appeals reversed, *Bazzetta v. McGinnis*, 423 F.3d 557 (6th Cir. 2005). On November 28, 2005, the Court of Appeals issued an amended opinion, *Bazzetta v McGinnis*, 430 F.3d 795 (6th Cir. 2005), clarifying that *Overton* foreclosed Respondents' procedural due process claim. Respondents' petition for writ of certiorari was denied by this Court on October 10, 2006. Pet. App. 137a. After this Court denied certiorari on October 31, 2006, Petitioner filed in the District Court a motion for entry of judgment on the basis that all of the claims at issue in Respondents' third amended complaint had been decided in favor of Petitioners. On November 20, 2006, the District Court granted Petitioners' motion for entry of judgment, and on that same day the District Court issued a judgment dismissing the case with prejudice; Pet. App. 151a.

2. Proceedings on the Interim Attorney Fees

During the pendency of the litigation—after the Court of Appeals opinion in 2002 but before this Court ultimately granted certiorari and unanimously reversed in 2003—the District Court, over Petitioners' objection, granted interim attorney fees to Respondents' counsel and ordered immediate payment.

The sole issue presented in this petition is whether Respondents are entitled to retain such attorneys fess when they are not prevailing parties under 42 U.S.C. § 1988(b).

Respondents were not prevailing parties under 42 U.S.C. § 1988(b) so Petitioners timely, properly, and repeatedly objected to any award of attorney fees. Before this Court granted the initial Petition for Certiorari, they disputed the factual basis of certain fees claimed by Respondents' counsel, but did not dispute the reasonableness of some other calculations of hourly rates and time spent, as submitted by Respondents' counsel. On June 27, 2002, the District Court ordered Petitioners to make immediate payment of the "interim" amount of $223,991.92 plus interest—the amount of hours and rates that Petitioners did not dispute: "Defendants shall make the following payments. . . within fourteen (14) days of this order."[7] Pursuant to that order Petitioners paid $224,036.92.

Three weeks later, on August 19, 2002, the District Court held that Respondents were prevailing parties and awarded additional attorneys' fees of

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[7] *Bazzetta v. McGinnis*, (unpublished order, E.D.Mich. No. 95-73540, June 27, 2002, order for payment of interim attorney fees; Pet.App. 35a-36a.)

$570,167.35, plus interest.[8] The court, however, did not order immediate payment of that amount and, accordingly, Petitioners did not pay these additional attorney fees. Subsequently, after the merits of all claims had been finally resolved against Respondents, the District Court entered an order vacating the second award, but denied Petitioners' request to vacate the award of interim fees that had already been paid.[9]

On appeal, the Court of Appeals declined to determine whether Respondents were a prevailing party under 42 U.S.C. § 1988(b), but nevertheless affirmed the District Court decision, unpublished opinion p. 7, Pet.App. 1a-9a:

> We make no statement about whether Plaintiffs are a prevailing party with respect to the interim fee award. Rather, we hold only that the district court did not abuse its discretion under § 1988 by refusing to vacate a previously granted award of attorney's fees to which Defendants not only failed to object, but agreed were "not in dispute," and which Defendants paid. [10]

The Court of Appeals committed reversible legal error in reviewing for abuse of discretion instead of determining the prevailing party issue as a matter of

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[8] *Bazzetta v. McGinnis*, (unpublished order, E.D. Mich. No. 95-73540, August 19, 2002, order granting plaintiffs' motion for attorney fees, pp. 14-15, 21; Pet.App. 37a-58a.)

[9] *Bazzetta v. McGinnis*, (unpublished order, E.D. Mich. No. 95-73540, November 20, 2006; Pet.App. 10a-14a.)

[10] *Bazzetta v. McGinnis*, (unpublished opinion 6th Cir. Nos. 06-2643/2644, August 28, 2008; Pet.App. 1a-9a.)

law, and it was simply wrong on the facts in concluding that Petitioners "failed to object" and did not dispute the award of interim attorney fees.[1]

REASONS FOR GRANTING THE PETITION

42 U.S.C. § 1988(b) gives the court discretion to allow a "reasonable attorney's fee" to a "prevailing party." In this case, there has been a dispositive adjudication of the merits in Petitioners' favor after almost 14 years of vigorous litigation, and the parties who brought the lawsuit lost on every claim. Nevertheless, the Court of Appeals has permitted these non-prevailing parties to retain almost one quarter of a million dollars in attorneys' fees. That result is contrary to the text of 42 U.S.C. § 1988(b), the intent of Congress, and decisions of this Court and other circuits. If allowed to stand, the Court of Appeals decision below will encourage the litigation of dubious claims in the hope of generating interim fee awards regardless of whether the party ultimately prevails. Of equal concern is that the Court of Appeals decision has the untoward effect of promoting, rather than discouraging, piecemeal appeals – since a party who does not immediately appeal an interim order awarding attorneys fees does so at their own peril.

I. *Respondents are not entitled to any attorney fees because they are not prevailing parties as a matter of law.*

The general American Rule is that a prevailing party is not entitled to collect attorneys' fees from the

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[1] The Court of Appeals denied Respondent's motion for rehearing with suggestion for rehearing en banc. *Bazzetta v. McGinnis*, (unpublished order denying rehearing, 6th Cir. Nos. 06-2643/2644, December 11, 2008; Pet.App. 15a-16a.)

loser. In 42 U.S.C. § 1988(b), Congress modified that rule for certain types of civil rights actions, including the present litigation, and has authorized federal district courts to award a "reasonable attorney's fee" to a "prevailing party" in certain circumstances. But the irreducible minimum requirement for this statutory fee is that there must have been a "material alteration of the legal relationship of the parties"[12] and the plaintiff must "receive at least some relief on the merits of his claim before he can be said to prevail."[13] Temporary relief during the course of the litigation is not sufficient.

If there was any doubt on this point, it was put to rest by this Court in *Sole v. Wyner*,: "[F]lecting success" by way of an injunction during trial does not "establish that [plaintiff] prevailed on the gravamen of her plea for injunctive relief."

> Prevailing party status, we hold, does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case.
>
> * * *
>
> Of controlling importance to our decision, the eventual ruling on the merits for defendants, after both sides considered the case fit for final adjudication, superseded the preliminary ruling. [Plaintiff's] temporary success rested on a premise that the District Court ultimately rejected.[14]

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[12] *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 792-793 (1989).

[13] *Hewitt v. Helms*, 482 U.S. 755, 760 (1987).

[14] *Sole v. Wyner*, 551 U.S. 74; 127 S. Ct. 2188, 2196 (2007).

In 2002 – before the merits of the claims had been ultimately resolved by this Court in *Overton*, the District Court concluded that Respondents were prevailing parties and ordered Petitioners to immediately pay interim attorney fees. However, the Court of Appeals decision below was made after the merits had been fully resolved in Petitioners' favor, and after this Court's decision in *Sole v. Wyner*, which clarified the definition of "prevailing party." Thus, the Court of Appeals should have held that Respondents were not prevailing parties as a matter of law, and therefore, not entitled to collect attorney fess under 42 U.S.C. § 1988(b). Instead, the Court of Appeals failed to apply the law and determine whether Respondents were prevailing parties within the meaning of § 1988(b), and further compounded its error by misapprehending the record and characterizing the issue as a factual dispute.[15]

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[15] The United States Court of Appeals for the Sixth Circuit, like other circuits, has held that "prevailing party" status is a question of law. *Radvansky v. City of Olmstead*, 496 F.3d 609, 619 (6th Cir. 2007):

> A district court's determination of prevailing-party status for awards under attorney-fee-shifting statutes -- such as 42 U.S.C. § 1988 -- is a legal question that we review de novo. *See Bridgeport Music, Inc. v. London Music, U.K.*, No. 05-5045, 226 Fed. Appx. 491, 2007 U.S. App. LEXIS 7847, 2007 WL 930409, at *2 (6th Cir. Mar. 28, 2007) (citing *Bailey v. Mississippi*, 407 F.3d 684, 687 (5th Cir. 2005), for the proposition that after *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001), "every Circuit to address the issue has determined that the characterization of prevailing-party status for awards under fee-shifting statutes . . . is a legal question subject to de novo review"); *see also Sole v. Wyner*, 127 S. Ct. 2188, 2194-97, 167 L. Ed. 2d 1069 (2007) (reviewing de novo prevailing-party status without explicitly

The text of 42 U.S.C. § 1988(b) demonstrates Congress's intention that only a "prevailing party" is eligible to recover attorneys' fees. *Sole v. Wyner* plainly holds that a party who obtains injunctive relief during litigation, but ultimately loses on the merits, is not a prevailing party. Thus, as a matter of law, Respondents are not prevailing parties. Just as in *Sole v. Wyner*, Respondents' "initial victory was ephemeral"; they may have won a battle during the trial, but they ultimately lost all their claims on the merits so they lost the war.[16] Here, just as in *Sole*, the same result has occurred since at the end of the litigation the parties' legal relationship was unchanged:

> At the end of the fray, [Michigan's prison visitation regulations] remained intact, and [Respondent Bazzetta] had gained no enduring "chang[e] [in] the legal relationship" between herself and the state officials she sued.[17]

Although the Court of Appeals misapplied the law in its review of the interim attorney fee award, other Circuit Courts have faithfully applied *Sole* and reversed attorney fee awards when plaintiffs have lost the war on the merits of their case.[18] "We have previously stated that 'a judicial pronouncement that the defendant has violated the Constitution, without more, does not make a plaintiff a prevailing party.' . . . Because the final judgment resulted in a finding of no constitutional

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stating the standard of review); *Toms v. Taft*, 338 F.3d 519, 528-30 (6th Cir. 2003) (same).

[16] *Sole*, 127 S. Ct. at 2196.

[17] *Sole*, 127 S. Ct. at 2196.

[18] *See Zessar v. Keith*, 536 F.3d 788 (7th Cir. 2008); and *Advantage Media, LLC v. City of Hopkins*, 511 F.3d 833 (8th Cir. 2008).

violation as to [plaintiff], it would be wrong to find [plaintiff] a prevailing party."[19]

The effect of the erroneous Court of Appeals decision below extends beyond this case, as it will undoubtedly be freely cited to as persuasive authority supporting a plaintiff's claim to interim attorney fees. If a plaintiff succeeds on any interim aspect of its case, regardless of the ultimate result, such decisions will encourage a plaintiff to seek awards of interim attorney's fees, secure in the knowledge that the money will not have to be reimbursed even if it ultimately loses every claim on the merits. A defendant will then be forced to pursue interlocutory appeals in order to protect itself against later claims that it did not resist sufficiently.

If a plaintiff ultimately succeeds to some extent on the merits—i.e., if the legal relationship of the parties is changed after the merits have been resolved—then an interim attorney fee may be appropriate. But that simply is not the case here as Respondents have not prevailed on any issue.

II. Petitioners timely raised and preserved objection to the award of interim attorney fees.

The Court of Appeals committed legal error when it declined to determine whether Respondents were a prevailing party under 42 U.S.C. § 1988(b), but nevertheless affirmed the District Court decision, finding no abuse of discretion. It compounded that error when it mischaracterized the record and concluded that Petitioners "failed to object" and did not dispute the

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[19] *Advantage Media, LLC*, 511 F.3d at 838-839. *See also Center for Biological Diversity v. Marina Point Development Co*, 535 F.3d 1026 (9th Cir. 2008); and *Biodiversity Conservation Alliance v. Stem*, 519 F.3d 1226 (10th Cir. 2008).

award of interim attorney fees.[20] The record conclusively demonstrates that in this vigorously-contested case Petitioners timely, properly, and continuously challenged Respondents' entitlement to any attorney fee.

While Petitioners did not object to some of the calculations regarding the number of hours and reasonable rate for some elements of Respondents' claims, Petitioners challenged many of the assertions. Thus, although some parts of the factual calculations were undisputed, Petitioners' objection to any legal entitlement by Respondents to attorneys fees under 42 U.S.C. § 1988(b) was an unyielding constant.

After the Court of Appeals decision in Respondents' favor in 2002, but before this Court granted certiorari and ultimately reversed on the merits, it became clear that the District Court intended to make an award of interim attorney fees, payable immediately, for an amount as to which Petitioners did not dispute the *calculation* of the hourly rate and number of hours.

For example, during the course of a telephone conference discussing an upcoming hearing on disputed aspects of the fee request, the Court said:

> THE COURT: Well, it seems to me, Ms. Ward [counsel for Petitioners] . . . that the State should be ordered to pay an interim attorney fee. I mean, I'm thinking that that's appropriate anyway. Once you pay an interim attorney fee, I don't really care how long this drags out. [21]

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[20] *Bazzetta .v McGinnis*, (unpublished opinion, p. 7, 6th Cir. Nos. 06-2643/2644, August 28, 2008; Pet.App. 1a-9a.)

[21] Transcript of telephone conference, June 13, 2002, p. 7; Pet.App. 22a-28a.

Petitioners', now prophetic, concern was that because the litigation was ongoing, the State of Michigan would be unable to recover an award of interim attorney fees if the Petitioners ultimately prevailed on the merits. As early as August 6, 2001, Petitioners requested that the District Court stay any award for interim attorney fees, or place the money in escrow, because if Petitioners prevailed on appeal it would be difficult for them to get reimbursement for any attorneys fees awarded to Respondents.[22] Respondent, however, opposed placing the money in an escrow account. The court denied Petitioners' request to place interim attorney fees in an escrow account at a hearing on June 17, 2002 and ordered that the State make an immediate interim payment, pending final resolution of all disputed items:

> THE COURT: I'm going to make an interim award of attorney fees here, and I'd like to know, Ms. LaBelle [Respondents' counsel], what your position is with respect to the proposed escrow that the state has asked for.
>
> MS LABELLE: You know, Your Honor, I would – I mean, we would oppose it.
>
> * * *
>
> MS. WARD [counsel for Petitioners]: Okay. First of all, I don't think we're talking about a grant or denial of cert two years down the road. The Supreme Court's pattern is to address this issue early in the fall. We are intending to file our cert

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[22] August 6, 2001 Defendants' motion and brief to hold in abeyance Plaintiffs' motion for attorney fees. Pet.App. 17a-20a.

petition and it is due July 10th and will be timely filed on or before that date. Second of all, the problem, Your Honor, is, first of all, there is no case support for the premise that if we go up on appeal, and if, as defendants have contended all along, there is no constitutional authority for this court, to make the awards that it has, to give the relief that it has, then plaintiffs are entitled to, to hang onto their attorney fees, and the problem is there's no assurances to the taxpayers of the State of Michigan that once they're awarded they're going to get money back. We're not asking for escrow forever, we're asking for escrow in the event that cert's denied, this will be a moot point by presumably fairly early in October. If cert is granted, then we can revisit this issue at that time.

THE COURT: Well, I think they're entitled to their attorney fees, to an interim attorney fee now, and if you want to seek a stay of my order, you know how to do that. I agree with you that there are amounts contested, but I am going to make an award, an interim award in the amount suggested by the state; that is, $223,991.92, payable within the next two weeks to the plaintiffs.

MS. WARD: Your Honor, you're denying our request for escrow by this?

THE COURT: I'm denying the request for escrow. And that's an interim order pending resolution of all of the outstanding

> issues with respect to the hourly rate, the recoverable costs, et cetera, and Ms. LaBelle, would you please prepare the order.[23]

Subsequently, on July 23, 2002, during another hearing on Respondents' motion for attorney fees, the District Court acknowledged that Petitioners' payment of interim attorney fees was involuntary and due to the District Court's order:

> MS. WARD: Secondly, I'd also like the record to reflect we've already sent attorney fees to counsel for a portion of the award.
>
> THE COURT: Well, I ordered you to.
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> MS. WARD: Correct, we did it at this court's direction. Again, I've been requested to state for the record, in the event that the sur [sic; cert] petition is granted, we want to contemplate what's going to happen to those fees. We did it under court order, we were required to, it was involuntary.
>
> THE COURT: All right, I'll consider the matter submitted.[24]

Although Petitioners made the interim payments as required by the District Court, they were under a court order to do so, and they could have been held in

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[23] Transcript of motion hearing, June 17, 2002, pp. 4-6; Pet.App. 22a-28a.

[24] Transcript of motion hearing, July 23, 2002, p. 71; Pet.App. 29a-34a.

contempt if they had not complied. But that award of interim attorney fees was not a final order appealable by right under 28 U.S.C. § 1291, and Petitioners' compliance with the order does not waive their right to later contest it by appealing the final judgment.[25]

The order that was entered on June 27, 2002, confirmed this interim award, "pending resolution of Plaintiffs' petition for fees and costs."[26] A subsequent order was entered on August 19, 2002, granting an additional attorney fee of $570,167.35, plus interest.[27] The Court did not order Petitioners to pay that additional amount immediately and, accordingly, Petitioners did not pay it. The Court subsequently vacated that portion of the fee award in the November 20, 2006, order.[28]

After this Court unanimously reversed the lower courts' rulings in this case, on November 4, 2003, Petitioners filed a second motion to place the attorney fees in escrow, which the District Court denied on December 23, 2003.[29] And after the Court of Appeals

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[25] *Weipking v. Prudential-Bache Securities Inc*, 940 F.2d 996, 999 (6th Cir. 1991). "One hesitates to contemplate the avalanche of motions for discretionary review that would burden the courts if parties were required to seek relief from clearly interlocutory orders or forfeit their right to appeal the matter when the litigation is concluded. *Id* at 1000.

[26] *Bazzetta v. McGinnis*, (unpublished order, E.D. Mich. No. 95-73540, June 27, 2002 order for payment of interim attorney fees; Pet.App. 35a-36a.)

[27] *Bazzetta v. McGinnis*, (unpublished order, E.D. Mich. No. 95-73540, August 19, 2002 order granting plaintiffs' motion for attorney fees, pp. 14-15, 21; Pet.App. 37a-58a.)

[28] *Bazzetta v. McGinnis*, (unpublished order, E.D. Mich. No. 95-73540, November 20, 2006; Pet.App. 151a.)

[29] *Bazzetta v. McGinnis*, (unpublished order E.D. Mich. No. 95-73540, December 23, 2003, Order denying motion to place attorney fees in escrow; Pet.App. 102a-118a.)

issued its decision on November 28, 2005,[30] Petitioners filed a third motion to place attorney fees in escrow on January 6, 2006, which the District Court denied on September 20, 2006.[31]

On appeal, the Court of Appeals erroneously found that Petitioners had "agreed" that the fees were "not in dispute," referring to the June 17, 2002 letter of Petitioners, which summarized the verbal ruling of the District Court. (Court of Appeals Opinion, Pet. App. 1a-9a) (June 17, 2002 letter; Pet. App. 68a). Contrary to this appellate finding of fact, at no time did Petitioners concede that Respondents were legally entitled to the interim attorney fees. Rather, what the letter was referring to was that the calculation and the amount of the interim fees were not in dispute, and that Petitioners were to comply with the District Court's order requiring payment. The Court of Appeals' finding of fact in this regard is patently wrong, for two reasons.

First, the June 17, 2002 letter itself conflicts with the Court of Appeals' finding. In that letter, Petitioners specifically asked that payment for the interim fees be escrowed "in the event Defendants prevail in their appeal to the Supreme Court" so that the "taxpayers of the State of Michigan are reimbursed for any attorneys fees and costs wrongly paid to Plaintiffs." (June 17, 2002 Letter; Pet. App. 68a). It makes no sense to find, as the Court of Appeals did, that Petitioners "agreed" that Respondents were legally entitled to interim attorneys fees, when in the same letter the Petitioners asked that

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[30] *Bazzetta v McGinnis*, 430 F.3d 795 (6th Cir. 2005), clarifying that *Overton* foreclosed Respondents' procedural due process claim.

[31] *Bazzetta v McGinnis*, (unpublished order E.D. Mich. No. 95-73540, September 20, 2006, order denying motion to place attorney fees in escrow; Pet. App. 136a.)

the fees be escrowed so Michigan's taxpayers could be reimbursed in the event that Petitioners prevailed.

Second, the Court of Appeals' finding is contradicted by Petitioners' actions throughout the history of this lawsuit. As the record forcefully demonstrates, this case has been vigorously contested by both parties. Under these circumstances, it was plainly unreasonable for the Court of Appeals to determine that the Petitioners, in their June 17, 2002 letter, were renouncing or waiving any future claim regarding the payment of these interim attorneys fees.

The record is clear: Petitioners timely, properly, and consistently opposed the award of any attorney fee. Because Respondents are not "prevailing parties," they are not entitled to any attorney fees under 42 U.S.C. § 1988(b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Alternatively, this Court should grant the petition, vacate the decision below and remand the case to the Court of Appeals with instructions that it determine whether Respondents are "prevailing parties" under 42 U.S.C. § 1988(b), and, if not, it should enter an order directing Respondents to reimburse the award, with interest, to Petitioners.

Respectfully submitted

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Dated: March 2009

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United States Sixth Circuit Court of Appeals
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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Case Nos. 06-2643, 06-2644

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL BAZZETTA, et al.,	)	
	)	
Plaintiffs-Appellees/ Cross-Appellants,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
	)	
v.	)	
	)	
KEITH MCGINNIS, Director of Michigan Department of Corrections; MICHIGAN DEPARTMENT OF CORRECTIONS,	)	
	)	
Defendants-Appellants/ Cross-Appellees.	)	

BEFORE: MARTIN and BATCHELDER, Circuit Judges; JORDAN,* District Judge.

ALICE M. BATCHELDER, Circuit Judge. Plaintiffs-Appellees/Cross Appellants ("Plaintiffs"), a class of prisoners and their potential visitors, 'first sued Defendants Appellants/Cross the Michigan Department of Corrections ("MDOC") and its director (collectively "Defendants") in 1995 to prevent the

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*The Honorable R. Leon Jordan, United States District Judge for the Eastern District of Tennessee, sitting by designation.

enforcement of newly passed regulations regarding prison visitation. The case has been back and forth among the district court, this court, and the Supreme Court and is now back before us to decide whether the district court abused its discretion in upholding an award to Plaintiffs of $223,991.92 in interim attorney's fees but vacating an award to Plaintiffs of $570,167.35 in additional attorney's fees. Because we conclude that the district court did not abuse its discretion, we **AFFIRM**.

I. BACKGROUND

The Supreme Court, in *Overton v. Bazzetta*, 539 U.S. 126, 129-31 (2003), and this court, in *Bazzetta v. McGinnis*, 430 F.3d 795, 797-98 (6th Cir. 2005) ("*Bazzetta III*"), sufficiently recounted the substantive facts of this case. Nonetheless, we will briefly highlight some of the facts figuring substantially in our analysis.

In 1995 MDOC enacted regulations regarding both contact and noncontact inmate visits, requiring each prisoner to provide a list of potential visitors (other than attorneys on official business and qualified members of the clergy) and to receive prior prison approval for those visits. *Overton*, 539 U.S. at 130. The regulations also put restrictions on the visitation privileges of minors, non-custodial children, and former prisoners, and put a two-year ban on visitors for all inmates found guilty administratively of two or more substance abuse offenses. *Id.* Reinstatement of visitation privileges for prisoners who committed substance-abuse violations was solely within the discretion of the warden. *Bazzetta III*, 430 F.3d at 797. Throughout the torturous litigation MDOC lifted certain regulations and revised still others. Moreover, Plaintiffs obtained temporary injunctive relief that prevented MDOC from enforcing its regulations from

May 2002 until August 2003 and then again from January 2004 until October 2006.

Of particular importance to our analysis is the procedural history of this case, which has now gone on for 13 years. Plaintiffs initially brought suit to prevent MDOC from enforcing its prison-visit regulations. The district court denied Plaintiffs relief, *Bazzetta v. McGinnis*, 902 F. Supp. 765 (E.D. Mich. 1995), because the new regulations applied only to contact visits. We affirmed, *Bazzetta v. McGinnis*, 124 F.3d 774 (6th Cir. 1997) ("*Bazzetta I*"), but issued a supplemental opinion, *Bazzetta v. McGinnis*, 133 F.3d 382 (6th Cir. 1998), to make clear that we concluded only that the regulations were constitutional as applied to contact visits. After it became clear that MDOC was applying the new regulations to noncontact visits, Plaintiffs moved to reinstate the case; the district court granted the motion on July 2, 1998. The district court, after a bench trial, ruled in favor of Plaintiffs, holding that the regulations were unconstitutional as applied to noncontact visits, *Bazzetta v. McGinnis*, 148 F. Supp.2d 813 (E.D. Mich. 2001). We affirmed that decision, *Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir, 2002) (*"Bazzetta II"*), and the district court issued an order of compliance enjoining Defendants from implementing the new regulations. Thereafter, we denied Defendants' motion to stay the injunction and the Supreme Court affirmed. Ultimately, however, the Supreme Court overruled our decision in *Bazzetta II*, holding that MDOC's regulations did not violate Plaintiffs' substantive due process rights or their rights under the First and Eighth Amendments.[1] *Overton*, 539 U.S. at 131; 137.

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[1]The court did not address the district court's determination that the regulations also violated Plaintiffs' procedural due process rights.

On June 27, 2002, between our ruling in *Bazzetta II* and the Supreme Court's decision in *Overton*, the district court issued an order granting Plaintiffs' request for interim attorney's fees in the amount of $223,991.92.[2] Defendants paid those fees without seeking a rehearing or appealing the district court's order. Instead, Defendants sent Plaintiffs' attorney a letter stating in relevant part:

> Defendants are prepared to agree to the following:
>
> 1. Defendants will send the Court a check in the amount of $223,991.92, which represents the attorney fees and costs that are not in dispute.
>
> 2. Defendants request that this money be placed in an escrow account by the Court until such time as the United States Supreme Court has ruled on Defendants' Petition for Writ of Certiorari.
>
> Defendants submit that this proposal is the only way to insure that, in the event Defendants prevail in their appeal to the Supreme Court, the taxpayers of the State of Michigan are reimbursed for any attorney fees and costs wrongly paid to Plaintiffs. Please let me know immediately if this proposal is satisfactory to Plaintiffs.

Plaintiffs never responded to Defendants' proposal and Defendants never filed with the district court a motion to put the money in escrow. Nonetheless, Defendants paid those fees on July 8, 2002. On August 19, 2002,

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[2]These fees are the subject Defendants' appeal.

the district court issued another order granting to Plaintiffs additional attorney's fees in the amount of $570,167.35.[3] Instead of simply paying this additional fee award, Defendants posted a bond and appealed. After the Supreme Court's *Overton* ruling Defendants moved this court for peremptory reversal of the order to pay the additional fees. A panel of this court denied that motion so that the district court could consider the question, *Bazzetta v. McGinnis,* 79 Fed. App'x 161 (6th Cir. 2003), and a separate panel remanded the case to the district court for further proceedings in light of the Supreme Court's decision, *Bazzetta v. McGinnis*, 73 Fed. App'x 842 (6th Cir. 2003). *Bazzetta III,* 430 F3d at 799-800. On remand, the district court denied Defendants' motions for summary judgment and to dissolve the injunctive order of compliance, holding that Plaintiffs were still a "prevailing party" and were entitled to some attorney's fees, and concluding that the Supreme Court's decision in *Overton* did not disturb the district court's procedural due process conclusion. Defendants appealed and we reversed holding that the district court's procedural due process ruling was inconsistent with *Overton*. *Bazzetta III*, 430 F.3d at 805.

On November 20, 2006, the district court issued an opinion and order denying Defendants' request to vacate its June 27, 2002, order granting Plaintiffs interim attorney's fees — the $223,991.92[4] — but granting Defendants' request to vacate, its August 19,

---

[3] These fees are the subject of Plaintiffs' cross appeal.

[4] There appears to be some disagreement about the total of the interim fees, as the district court at least once stated that it awarded to Plaintiffs $224,036.92. The difference is a mere $45 and is not material to our decision.

2002, order awarding Plaintiffs additional attorney's fees — the 570,167.35. Defendants timely appealed to this court the first part of the ruling, and Plaintiffs timely appealed the second part of the ruling.

II. STANDARD OF REVIEW

We review for abuse of discretion a district court's award of attorney's fees under 42 U.S.C. § 1988. *Hadix v. Johnson*, 65 F.3d 532, 534 (6th Cir 1995). The abuse of discretion standard applies to both a denial and a grant of attorney's fees under § 1988. *Dubuc v. Green Oak Township,* 312 F.3d 736, 744 (6th Cir. 2002).

III. ANALYSIS

After *Bazzetta II* Plaintiffs moved for attorney's fees under § 1988, which allows a district court in its discretion, "[i]n any action, to enforce a provision of" section 1983 to award "the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (2008); *Texas State Teachers Ass'n v. Garland Independent School District,* 489 U.S. 782, 788 (1989) ("*Garland*"). Congress intended that courts use § 1988 to award attorney's fees "only when a party has prevailed on the merits." *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (per curiam).

A plaintiff is a "'prevailing party' for attorney's fees purposes if [he] succeed[s] on any significant issue in litigation which achieves some of the benefit sought in bringing suit." *Farrar v. Hobby,* 506 U.S. 103, 109 (1992) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). "[The] plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Garland*, 489 U.S. at 792 (citing *Hewitt v. Helms,* 482

U.S. 755, 760-61 (1987)). A plaintiff who wins on any significant issue — achieving a benefit it sought in bringing suit — but loses on other issues is still a prevailing party and may be entitled to some kind of fee award. *Id.* at 791-92. Moreover, a plaintiff obtaining injunctive relief may be a prevailing party as long as the injunction indicates probable success on the merits and is not merely procedural or a maintaining of the status quo. *Dubuc*, 312 F.3d at 753. But, a "plaintiff who achieves a transient victory at the threshold of an action can gain no award under [§ 1988] if, at the end of the litigation, her initial success is undone and she leaves the courthouse empty." *Sole v. Wyner*, 127 S. Ct. 2188, 2192 (2007).

Moreover, in passing § 1988 it is clear "that Congress contemplated the award of fees *pendente lite* in some cases." *Hampton*, 446 U.S. at 757 (emphasis original). A district court may award interim attorney's fees during the pendency of litigation when that court has "entered a concrete order that determines substantial rights of the parties, meaning when a party has prevailed on the merits of at least some of his claims" *Webster v. Sowders*, 846 F.2d 1032, 1036 (6th Cir. 1988) (quoting *Hampton*, 446 U.S. at 757-58) (internal quotation marks omitted).

The district court determined that Plaintiffs prevailed — in terms of the interim attorney's fees — even though *Overton* and *Bazzetta III* reversed the entire legal victory Plaintiffs obtained in *Bazzetta II*. It reasoned that the injunctive relief Plaintiffs obtained altered the status quo and that numerous Plaintiffs received "positive, lasting results." The district court further found that, given the decisions in *Overton and Bazzetta III*, Plaintiffs could not qualify as a prevailing party for the pendency of litigation and were therefore not entitled to the additional attorney's

fees. We review each of those decisions for abuse of discretion.

A. The interim fees

Defendants contend that the district court abused its discretion by upholding its award of attorney's fees to a party that did not prevail on the merits. As the district court properly pointed out, however, Defendants did not appeal or even protest the initial order awarding to Plaintiffs interim attorney's fees. Nor did Defendants file a motion in the district court to put the money in an escrow account until the resolution of the appeal. Instead, Defendants paid what they labeled "the attorney fees and costs that are not in dispute." Defendants now claim that their proposal to have the district court put the money in an escrow account until the resolution of their appeal of *Bazzetta II* qualifies as an objection to the order. This argument has no merit. If Defendants believed the interim fees were in any way in dispute they could have sought an immediate appeal. Defendants did not do so, but now ask this court to cure their complacency. We will not do so.

We make no statement about whether Plaintiffs are a prevailing party with respect to the interim fee award. Rather, we hold, only that. the district court did not abuse its discretion under § 1988 by refusing to vacate a previously granted award of attorney's fees to which Defendants not only failed to object, but agreed were "not in dispute," and which Defendants paid.

B. The additional fees

Plaintiffs, maintaining that they were a prevailing party even after *Bazzetta II*, argue that the district court abused its discretion in vacating its August 19, 2002, award of additional attorney's fees.

Unlike their response to the district court's award of interim attorney's fees, Defendants protested the award of additional attorney's fees, posted a bond, and immediately appealed the district court's decision. It is clear to us — as it was to the district court in vacating the award — that *Overton* and *Bazzetta III* make it impossible to label Plaintiffs a prevailing party, as they achieved only a transient victory in *Bazzetta II* if and eventually left the courthouse empty. See *Sole*, 127 S. Ct. at 2192. Therefore, the district court did not abuse its discretion.

IV. CONCLUSION

For the foregoing reasons, we hold that the district court did not abuse its discretion in vacating the award of additional attorney's fees but failing to vacate the award of interim attorney's fees. Therefore, we **AFFIRM** the decision of the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZZETTA, et al.,

Plaintiffs,

v.

KENNETH McGINNIS, et al.,

Defendants.
_____/

Case No. 95-73540

Honorable Nancy G. Edmunds

ORDER DENYING DEFENDANTS' REQUEST TO VACATE JUNE 27, 2002 ORDER FOR PAYMENT OF INTERIM ATTORNEY FEES; GRANTING DEFENDANTS' REQUEST TO VACATE AUGUST 19, 2002 ORDER GRANTING PLAINTIFFS' MOTION FOR ATTORNEY FEES; AND VACATING AUGUST 19, 2002 ORDER GRANTING PLAINTIFFS ATTORNEY FEES

This matter is before the Court to address Defendants' request to have this Court vacate its June 27, 2002 Order awarding $224,036.92 in interim attorney fees to Plaintiffs[1] and this Court's August 19, 2002 Order granting Plaintiffs' motion for an additional $570,167.35 in attorney fees and costs. Defendants did not appeal the June 27, 2002 Order, but did appeal the August 19, 2002 Order.

---

[1]This represents attorney fees that Defendants did not contest as unreasonable. *See* 6/27/02 Order.

The Court finds that the facts and legal arguments are adequately presented in the motion and briefs and that the decision process will not be significantly aided by oral argument. Thus, pursuant to E.D. Mich. L. R. 7.1(e)(2), it is hereby ORDERED that the Defendants' requests shall be resolved as submitted.

For the reasons stated below, this Court DENIES Defendants' request to vacate its June 27, 2002 Order awarding interim attorney fees to Plaintiffs, but GRANTS Defendants' request to vacate its August 19, 2002 Order awarding Plaintiffs an additional $570,167.35 in attorney fees.

A. June 27, 2002 Order Awarding Interim Attorney Fees

It is not disputed that, at the time they were awarded, this Court had the authority to award interim attorney fees to Plaintiffs in this matter. As of June 27, 2002, this Court had entered an order determining the substantial rights of the parties, and Plaintiffs were the prevailing party on the merits of their claims. Thus, an award of interim attorney fees was appropriate. *See Hanrahan v. Hampton*, 446 U.S. 754, 757-58 (1980); *Webster v. Sowders*, 846 F.2d 1032, 1036 (6th Cir. 1988). *See also Frazier v. Bd. of Trustees of Northwest Mississippi Regional Medical Center*, 765 F.2d 1278, 1293-94 (5th Cir. 1985) (affirming the district court's interim award of attorney fees to a plaintiff who had obtained substantive relief and a preliminary injunction against the defendants and observing that even though "a plaintiff eventually loses on the merits of a section 1983 claim" this "does not automatically undermine the validity of an interim attorney's fee award based on substantial relief . . . . A plaintiff's prevailing-party status requires the district court to have passed

favorably on the merits of the civil rights claim and to have granted relief that would not have been gained but for the litigation.")

Defendants did not appeal that June 27, 2002 Order and paid Plaintiffs $224,036.92 without first requiring that Plaintiffs post bond in that amount. Despite these facts and their failure to provide authority on point, Defendants ask this Court to vacate its earlier Order and to enter a new order forcing Plaintiffs to disgorge the $224,036.92 in interim attorney fees properly paid to Plaintiffs over four years ago. The Court denies Defendants' request. The injunctive relief Plaintiffs obtained prior to the June 27, 2002 Order did not maintain the status quo; it altered it. As a consequence of this Court's orders lifting the permanent bans at issue here, numerous Plaintiffs obtained positive, lasting results. Many had the permanent ban due to substantive abuse violations lifted before their release or parole. These Plaintiffs, as well as their families, were able to enjoy visits previously banned. Moreover, as the Sixth Circuit recently observed, "the issues presented" in this case "posed significant public policy concerns and presented difficult and close legal issues to the courts" where "[t]he prisoners and their visitors initially prevailed" in the district court and the Sixth Circuit "but lost in the Supreme Court." *Bazzetta v. Caruso*, 183 Fed. App'x 514, 515 (6th Cir. May 23, 2006) (rejecting a request that Plaintiffs be taxed costs in the amount of $16,208.25 because "[t]he litigation was taken in good faith, the case was difficult, and there is no necessity on the part of the prevailing party, the Michigan prison system, for a cost award" and observing that "the plaintiffs here are all prisoners and their visitors" who "will possess few resources with which to meet an award of costs.").

B. August 19, 2002 Order Awarding Attorney Fees to Plaintiffs as Prevailing Parties

After the award and payment of undisputed interim attorney fees, this Court considered Plaintiffs' additional request for disputed attorney fees and costs incurred through May 2002. On August 19, 2002, this Court ruled that Plaintiffs were prevailing parties and awarded Plaintiffs reasonable attorney fees and costs in the amount of $570,167.35. Defendants posted a bond for these fees and appealed.

The appeal was stayed pending a ruling in *Overton v. Bazzetta*, 539 U.S. 126 (2003). After *Overton* was decided in Defendants' favor, Defendants filed a motion in the Sixth Circuit seeking a peremptory reversal of this Court's August 19, 2002 decision. The Sixth Circuit denied Defendants' motion and remanded the matter to this Court so that it may reconsider the Plaintiffs' status as a prevailing party in light of the Supreme Court's decision in *Overton*. *Bazzetta v. McGinnis*, 79 Fed. App'x 161 (6th Cir. Oct. 24, 2003). In a December 23, 2003 Order, this Court determined that Plaintiffs had prevailed on a number of significant issues including their request for injunctive relief, expanded visits for minor children, and their claim of a procedural due process violation. Given the decision by the Supreme Court in *Overton*, however, this Court ordered further briefing before resolving the reasonableness of attorney fees previously awarded. The matter has now been fully briefed. As discussed above, this Court will not disturb its prior, unappealed June 27, 2002 order and Defendants' payment to Plaintiffs of $224,036.92 in attorneys fees. Given the decision by the Supreme Court in *Overton* and the Sixth Circuit's decision holding the there was no facial procedural due process violation, *Bazzetta v. McGinnis*, 423 F.3d 557 (6th Cir. 2005), this Court vacates its August 19, 2002

Order awarding Plaintiffs additional attorney fees in the amount of $570,167.35.

SO ORDERED.

s/Nancy G. Edmunds
Nancy G. Edmunds
United States District Judge

Dated: November 20, 2006

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on November 20, 2006 by electronic and/or ordinary mail.

s/Carol A. Hemeyer
Case Manager

Nos. 06-2643/2644

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHELLE BAZZETTA, ET AL.,	)	
	)	FILED
Plaintiffs-Appellees/	)	Dec 11, 2008
Cross-Appellants,	)	LEONARD
	)	GREEN, Clerk
v.	)	
	)	
KENNETH MCGINNIS, DIRECTOR	)	ORDER
OF MICHIGAN DEPARTMENT	)	
OF CORRECTIONS, ET AL.,	)	
	)	
Defendants-Appellees/	)	
Cross-Appellees.	)	

BEFORE: MARTIN and BATCHELDER, Circuit Judges; and JORDAN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

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*Hon. R. Leon Jordan, Senior United Sates District Judge for the Eastern District of Tennessee, sitting by designation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZZETTA, STACY BARKER, TONI BUNTON, DEBRA KING, SHANTE ALLEN, ADRIENNE BRANAUGH, ALESIA BUTLER, TAMARA PRUDE, SUSAN FAIR, VALERIE BUNTON and ARTURO BUNTON, through his Next Friend VALERIE BUNTON,

Plaintiffs,

Case No. 95-73540

HON. NANCY G. EDMUNDS

v.

KENNETH McGINNIS, DIRECTOR OF MICHIGAN DEPARTMENT OF CORRECTIONS; MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendants.

_____/

DEFENDANTS' MOTION AND BRIEF TO HOLD IN ABEYANCE PLAINTIFFS' MOTION FOR ATTORNEY FEES

Defendants, Bill Martin and the Michigan Department of Corrections ("MDOC"), through their attorney, Lisa C. Ward, and pursuant to Fed. R. Civ. P. 7, hereby move this Court to hold Plaintiffs' Motion For Attorney Fees in abeyance pending disposition of the appeal of this matter. In support of their motion, Defendants state as follows:

On April 25, 2001, this Court entered a Judgment in this case, wherein it adopted its April 19, 2001 Findings Of Fact And Conclusions Of Law. In its April 25, 2001 Judgment, this Court found in favor of Plaintiffs and against Defendants as to all claims, along with interest, costs and attorneys' fees as provided by law. Defendants' Notice of Appeal with regard to this Court's April 25, 2001 Judgment and April 19, 2001 Findings Of Fact And Conclusions Of Law was filed on April 27, 2001.

Defendants' motion to stay enforcement of judgment was denied by this Court on May 15, 2001. On May 18, 2001, Defendants filed an emergency motion for stay in the Sixth Circuit Court of Appeals, and on that same day a single-judge Order was entered granting Defendants' motion. After Plaintiffs filed a motion requesting that the Sixth Circuit review issuance of the May 18, 2001 Order granting a stay in this case, on June 8, 2001, a three-judge motions panel entered an order denying Plaintiffs' motion. In their June 8, 2001 Order, the Sixth Circuit discussed the limited role that federal courts should play in the administration of state penal systems and noted that "the district court's ruling, by its very nature, raises serious questions going to the merits." *Id.* at p. 2.

Subsequently, on June 11, 2001, Plaintiffs filed a motion requesting that the Sixth Circuit reconsider its June 8, 2001 Order, or in the alternative requesting en banc review of the entire stay. Plaintiffs' motion was denied by the Sixth Circuit on July 19, 2001. In its July 19, 2001 Order, the Sixth Circuit determined that the June 8, 2001 stay should remain in place with regard to the 1995 prison visitation rules as well as the substance abuse visitation restriction:

> Neither are we persuaded that the June 8, stay should be lifted as it pertains to

> the permanent ban on visitation for any prisoner convicted of two or more in-prison substance abuse misconducts. At trial, the defendants testified that the permanent restriction was developed in order to reduce substance abuse within the prison system and was implemented as part of a "zero tolerance" policy.
>
> * * *
>
> The defendants' rationale is, however, encompassed by their claim that the district court failed to accord the Michigan Department of Corrections the deference required by *Turner v. Safely*, 482 U.S. 78 (1987), and improperly placed the burden of proof on the defendants. The elimination of alcohol and drug use within the prison system is a legitimate penological objective. *Id.* at p. 2.

Thus, although the Sixth Circuit has not determined that Defendants will ultimately prevail on the merits of their appeal, in three separate orders dealing with Defendants' motion for stay, the Sixth Circuit has ruled that Defendants have demonstrated a likelihood of success on the merits of their appeal.

In their motion, Plaintiffs are requesting that this Court award them over $660,000.00 in attorney fees and costs. Should Defendants prevail on appeal, Plaintiffs will no longer be the prevailing parties in this litigation, and thus, not entitled to attorney fees and costs pursuant to 42 U.S.C. § 1988. In addition, it will be almost impossible for Defendants to recoup from Plaintiffs any money awarded by this Court years after Defendants' appeal has been decided by the Sixth Circuit. Therefore, in order to protect the treasury of the State of Michigan, Defendants are requesting that this Court hold Plaintiffs' motion for attorney fees in

abeyance until the Sixth Circuit has decided the merits of Defendants' appeal.

WHEREFORE, for the above-stated reasons, Defendants, Bill Martin and the Michigan Department Of Corrections, respectfully request that this Court grant their motion and hold Plaintiffs' Motion For Attorney Fees in abeyance pending disposition of the appeal of this matter.

Respectfully submitted,

JENNIFER M. GRANHOLM
Attorney General

s/Lisa C. Ward

Lisa C. Ward (P38933)
Special Assistant Attorney General
1300 North Waverly, #1
Lansing, Michigan 48917
517/323-0300

Dated: August 6, 2001

PROOF OF SERVICE

The undersigned certifies that a copy of the above document(s) was served upon the attorneys of record or parties appearing in pro per in the above cause by mailing the same to them at their respective address, with first class postage fully prepaid thereon, on August 6, 2001.

_____
Legal Secretary

Friedman/ 1995052460A / Pleadings Mot.Abey.AttryFees

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZZETTA, et al,

Plaintiff(s)

V.

CASE NO. 95-73540
HON. NANCY G. EDMUNDS

KENNETH McGINNIS, et al.

Defendant(s).

_____/

ORDER GRANTING MOTION TO HOLD IN ABEYANCE

This matter having come before the Court on Defendants' Motion To Hold In Abeyance Plaintiffs' Motion For Attorney Fees filed August 7, 2001. The Court having read the motion and brief and Plaintiffs' Response and being fully advised in the premises;

IT IS HEREBY ORDERED that Defendants' Motion is **GRANTED**.
SO ORDERED:

s/Nancy G. Edmunds
NANCY G. EDMUNDS
United States District Judge

Date: Aug 21, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZZETTA, ET AL,

Plaintiffs,

v. CIVIL ACTION
NO. 95-73540

KENNETH MCGINNIS, ET AL,

Defendants.
_____/

MOTION HEARING
BEFORE THE HONORABLE JUDGE NANCY G. EDMUNDS
United States District Judge
Theodore Levin U.S. Courthouse
231 West Lafayette Boulevard, Room 226
Detroit, Michigan
June 17, 2002

APPEARANCES :

MS. DEBORAH A. LaBELLE, ESQ.

In behalf of Plaintiff.

MS. LISA WARD, ESQ.

In behalf of Defendant.

- - -

To obtain an official transcript, contact:
Suzanne Jacques, CSR, RMR
Official Court Reporter · U.S. District Court
313-964-5121

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EXHIBITS

Exhibit No.	Offered	Received

Detroit, Michigan

June 17, 2002

4:40 p.m.

- - -

MS. WARD: Lisa Ward, and with me is Amy Reed, assisting me on discovery, paralegal.

MS. LABELLE: Deborah LaBelle.

MS. WARD: Is this telephone conference on the record?

THE COURT: It is.

I saw the state's proposal with respect to an interim order of attorney fees. I've read all of your submissions on this.

MS. WARD: Your Honor, since the last submission by Ms. LaBelle was faxed to me at around 4:00, may I make a couple of comments as to that?

THE COURT: Well, I don't know what the fact that it was submitted to you at 4:00 has to do with it, but go ahead.

MS. WARD: I'd just point out to the cases that she cites, the Grega(sp) versus Gordon(sp), and that's the Second Circuit case. In that particular case, the litigation was brought by an individual that was no longer a prisoner at the time that he filed the complaint, so therefore, we feel it is not relevant to the issues before the Court with regard to this case. No dispute that approximately 44 to 47,000 of plaintiff's zlass members are incarcerated felons.

THE COURT: Well, you also have a number of plaintiffs who are not incarcerated felons who are members of the public who are former prisoners, who are family members.

I mean, I don't know that there's a dispositive answer to this question, but I don't think it's so clear cut that the fee is limited by the PLRA.

Also, your calculation is correct under the PLRA.

MS. WARD: That was my second point, Your Honor. Ms. LaBelle cites a rate in the PLRA that started I believe October 1 of last year. Now, we can argue about what rate should apply, but clearly we would object to applying that rate, the increased rate, to any fees that were incurred prior to the date that the rate was imposed, and I think there's support for that reading of the statute under Martin versus Hadix, 527 U.S. 343 1999 with regard to that, but it's my understanding that these were the kinds of issues that are supposed to be at issue in our hearing in July 23rd.

THE COURT: I'm going to make an interim award of attorney fees here, and I'd like to know, Ms. LaBelle, what your position is with respect to the proposed escrow that the state has asked for.

MS. LABELLE: You know, Your Honor, I would -- I mean, we would oppose it. Even in the unlikely event that they file -- I mean, they haven't filed a cert petition yet, but in the event that they in the future do file a cert petition and it's granted, and two years down the line the Supreme Court overturns this, I think it's pretty clear that what we're – I mean, they can contest our fees in responding to that cert petition, but up to this point we have gotten -- we have gotten the relief that we requested, which is really one of the tests is whether the fees we've spent to date, the

hours we've spent to date are reasonably related to the kinds of relief we've gotten.

And even if two, three years from now people who are now visiting have their visits in some way restricted, I think it's fairly strong in terms of the cases that, you know, after seven years of people not visiting, for them to be able to visit for three years is a significant relief for what we asked for, and I don't think that whatever happens with a future cert petition that hasn't even been filed, given that the stays have both been denied, whatever happens in the future is not relevant to our having prevailed and people getting their visits now.

MS. WARD: May I respond to those points briefly?

THE COURT: Yes.

MS. WARD: Okay. First of all, I don't think we're talking about a grant or denial of cert two years down the road. The Supreme Court's pattern is to address this issue early in the fall. We are intending to file our cert petition and it is due July 10th and will be timely filed on or before that date. Second of all, the problem, Your Honor, is, first of all, there is no case support for the premise that if we go up on appeal, and if, as defendants have contended all along, there is no constitutional authority for this court, to make the awards that it has, to give the relief that it has, then plaintiffs are entitled to, to hang onto their attorney fees, and the problem is there's no assurances to the taxpayers of the State of Michigan that once they're awarded they're going to get money back. We're not asking for escrow forever, we're asking for escrow in the event that cert's denied, this will be a moot point by presumably fairly early in October. If

cert is granted, then we can revisit this issue at that time.

THE COURT: Well, I think they're entitled to their attorney fees, to an interim attorney fee now, and if you want to seek a stay of my order, you know how to do that. I agree with you that there are amounts contested, but I am going to make an award, an interim award in the amount suggested by the state; that is, $223,991.92, payable within the next two weeks to the plaintiffs.

MS. WARD: Your Honor, you're denying our request for escrow by this?

THE COURT: I'm denying the request for escrow. And that's an interim order pending resolution of all of the outstanding issues with respect to the hourly rate, the recoverable costs, et cetera, and Ms. LaBelle, would you please prepare the order.

CERTIFICATE OF COURT REPORTER

I certify that the foregoing is a correct transcript from reported proceedings in the above-entitled matter.

s/Suzanne Jacques _____ 04-20-2007
SUZANNE JACQUES, CSR, RMR Date
Official Court Reporter
Eastern District of Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZZETTA, et al,

Plaintiffs,

v. CIVIL ACTION
NO. 95-73540

KENNETH MCGINNIS, Director of Michigan Department of Corrections, et al,

Defendants.
_____/

MOTION FOR ATTORNEY FEES
BEFORE THE HONORABLE NANCY G. EDMUNDS
United States District Judge
226 Theodore Levin U.S. Courthouse
231 Lafayette Boulevard
Detroit, Michigan
July 23, 2002

APPEARANCES:

MS. DEBORAH A. LABELLE, ESQ.,
MS. PATRICIA STREETER, ESQ.
In behalf of Plaintiffs.

MS. LISA WARD, ESQ
In behalf of Defendants.

Suzanne Jacques, CSR, RMR
Official Court Reporter
Phone: 313-964-5121

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delay in receiving funds, and that's the standard in this circuit, as well.

Finally, I just -- I want to say with regard to -- I understand the court has given Ms. Ward a surreply brief, but I am concerned that there has never been a challenge to the hourly rates, even in the reply brief, by Mr. Schratz.

THE COURT: I agree, and if you're considering that that's what you're going to.

MS. WARD: Absolutely not, Your Honor. I want to respond to the law. That's all I asked for.

THE COURT: All right. That's fine.

MS. LABELLE: Then my concern is alleviated and I don't have any other points, Your Honor.

MS. WARD: May I be permitted to make two additional points, Your Honor?

THE COURT: Well, it's really her motion. I've already given you your surreply. Do I have to give you your sur-argument, too?

MS. WARD: Just to correct the record on one misstatement.

THE COURT: Go ahead.

MS. WARD: She's requesting interest on the fee. I understand her argument that you start at the market rates today, but it is not the case that she is not going to be compensated if this court awards interest on any amount of money she's not been given previously.

Secondly, I'd also like the record to reflect we've already sent attorney fees to counsel for a portion of the award.

THE COURT: Well, I ordered you to.

MS. WARD: Correct, we did it at this court's direction. Again, I've been requested to state for the record, in the event that the sur petition is granted, we want to contemplate what's going to happen to those fees. We did it under court order, we were required to, it was involuntary.

THE COURT: All right. I'll consider the matter submitted. I'll await your surreply, Ms. Ward, and I'll get something out to you in the next 30 days.

MS. LABELLE: Just for all parties' abdication, we have done a summary of the attorney fees and costs including the supplementals and reflecting the payment of the fees.

THE COURT: Thank you.

MS. LABELLE: That have been paid to date.

MS. WARD: If we find clerical errors I'll address them in the surreply.

THE COURT: That would be fine.

MS. WARD: And the deadline for that, Your Honor, you said a week, are you talking seven business days?

THE COURT: No, I'm talking a week from today.

MS. WARD: Seven calendar days. Thank you.

(Proceedings concluded 11:25 a.m.)

CERTIFICATE OF COURT REPORTER

I certify that the foregoing is a correct transcript from reported proceedings in the above-entitled matter.

s/Suzanne Jacques _____ 10-22-02
SUZANNE JACQUES, CSR RMR Date
Official Court Reporter
Eastern District of Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZZETTA, et al.,

Plaintiffs,

Honorable Nancy G. Edmunds

v.

Case No: 95-CV-73540-DT

KENNETH McGINNIS, et al.,

Defendants.
_____/

ORDER FOR PAYMENT OF INTERIM ATTORNEYS FEES

This matter having come before the Court on Plaintiffs' request for payment of undisputed attorney fees and costs and the court having reviewed the parties' pleadings and heard oral argument thereon;

IT IS HEREBY ORDERED that, pending resolution of Plaintiffs' petition for attorney fees and costs, Defendants' shall make payment of those attorney fees and costs that are not in dispute;

IT IS FURTHER ORDERED that Defendants shall make the following payments, which represent the undisputed attorney fees and costs in this matter, within fourteen (14) days of entry of this Order, together with interest from April 25, 2001, the date of judgement in this case:

To Deborah LaBelle: $95,475.74

To Patricia Streeter: $36,216.80

To Michael Barnhart: $59,043.38

To Barbara Levine $33,256.00

IT IS SO ORDERED this day of , 2002.

s/NANCY G. EDMUNDS
United States District Court Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZZETTA, ET AL., Case No. 95-73540

Plaintiffs, Honorable Nancy G. Edmunds

v.

KENNETH McGINNIS, ET AL.,

Defendants.
_____/

ORDER GRANTING PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

Plaintiffs, a class of prisoners and prospective prison visitors, brought this action in August 1995, under 42 U.S.C. Section 1983, challenging the constitutionality of new visitation procedures issued by the Michigan Department of Corrections ("MDOC"). The visitation procedures barred certain classes of individuals from visiting prisoners, limited the number of visitors per prisoner, and permanently banned visitors, apart from clergy and attorneys, for prisoners who twice violated MDOC's drug abuse policies. When plaintiffs filed their lawsuit, these procedures had not yet gone into effect. Plaintiffs obtained a temporary restraining order ("TRO") on September 1, 1995, which enjoined defendants from implementing the new visitation procedures. The TRO remained in effect until October 6, 1995, when the Court denied plaintiffs' motion for a preliminary injunction. *Bazzetta v. McGinnis*, 902 F. Supp. 765 (E.D. Mich. 1996)("*Bazzetta I*"). The case was certified as a class action on December

22, 1995, and then dismissed on defendants' motion for summary judgment on April 9, 1996.

In *Bazzetta I*, the Court found plaintiffs' challenge to the permanent ban on visitors for substance abuse violations not ripe for review, but upheld the other regulations as they applied to contact visits. The Sixth Circuit affirmed the Court's decision, holding that "there is no inherent, absolute right to contact visits with prisoners." *Bazzetta v. McGinnis*, 124 F.3d 774, 779 (6th Cir. 1997). The court of appeals issued a supplemental opinion clarifying that its opinion did not, as construed by defendants, apply to noncontact visitation. *Bazzetta v. McGinnis*, 133 F.3d 382 (6th Cir. 1998). The Sixth Circuit determined that defendants had "seriously misled" it and the district court by indicating that the new regulations applied only to contact visits, when in fact MDOC was applying them to all visits, contact and non-contact. *Bazzetta v. McGinnis*, 286 F.3d 311, 315 (6th Cir. 2002).

Plaintiffs moved for reinstatement of the case on March 6, 1998, when it became clear that defendants in fact were applying the new visitation procedures to non-contact visits and were exercising their discretion and permanently banning visitation for prisoners following two major misconducts involving substance abuse violations. The Court, over defendants' objections, reinstated the case on July 2, 1998. After a nine day bench trial in September 2000, the Court found in plaintiffs' favor and ruled that MDOC's visitation procedures were unconstitutional. *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813 (E.D. Mich. 2001)("*Bazzetta II*"). The Court held that the regulations limiting visits infringed on prisoners' First Amendment right of intimate association and were not reasonably related to a valid penological objective, and that the permanent ban on visitors for two violations of the drug abuse policy infringed on prisoners' First

Amendment right of intimate association, was not reasonably related to a valid penological objective, was cruel and unusual punishment in violation of the Eighth Amendment, and was imposed in a manner violating prisoners' Fourteenth Amendment due process rights. The Court issued a Judgment on April 25, 2001, finding in favor of plaintiffs and against defendants as to all claims and awarding plaintiffs costs and attorneys' fees. The Sixth Circuit subsequently affirmed the Court's decision. *Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir. 2002).

Pursuant to this Court's Judgment awarding plaintiffs attorneys' fees and costs, plaintiffs' counsel, Deborah LaBelle, Michael Barnhart, Barbara Levine, and Patricia Streeter, submitted a petition for their fees and costs on June 25, 2001. This application included the fees and costs of Ms. LaBelle's associate Kim Easter and legal assistant Susan Fair and the fees and costs of plaintiffs' experts, Terry Kupers, M.D., Community Service Systems, Inc., and Barry Mintzes, Ph.D. Defendants filed a response on August 8, 2001. The matter was stayed pending defendants' appeal to the Sixth Circuit of the Court's decision in *Bazzetta II*. On May 28, 2002, after the Sixth Circuit affirmed the Court's decision, a hearing was scheduled on plaintiffs' petition for July 23, 2002. Prior to the hearing, the parties filed several supplemental pleadings.[1] Three issues are raised in those pleadings.

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[1]Plaintiffs' counsel filed a supplemental application on June 27, 2002, setting forth attorneys' fees and costs through May 21, 2002. On July 31, 2002, plaintiffs presented a summary of the time expended and hourly rates for counsel and Ms. LaBelle's legal assistant: (1) for Ms. LaBelle 1,667.35 hours at an hourly rate of $225; (2) for Mr. Barnhart 663.30 hours at an hourly rate of $200; for Ms. Levine 595.80 hours at an hourly rate of $160; for Ms. Streeter 517.10 hours at an hourly rate of $200; and

The first issue is whether Section 803(d)(3) of the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. Section 1997e(d), applies to this matter. The second issue is whether plaintiffs should be considered a "prevailing party" in this case prior to April 25, 2001, the date the Court issued its opinion in *Bazzetta II*. Prior to April 25, Defendants argue, plaintiffs were not the prevailing party because this Court, the Sixth Circuit, and the Supreme Court ruled against them with respect to contact visits. *Bazzetta I*, 902 F. Supp. 765 (E.D. Mich. 1990). Defendants contend that plaintiffs are not entitled to fees and costs for work performed on *Bazzetta I*, but only fees and costs incurred after the case was reinstated on June 26, 1998. The third issue is whether plaintiffs' fees and costs are reasonable.

I. Whether Section 803(d)(3) of the PLRA applies to this matter

Section 803(d)(3) of the PLRA caps the amount of attorneys' fees and costs in any action "brought by a prisoner" to 150% of the hourly rate established under Section 3006A of Title 18 for payment of court appointed counsel. According to defendants, the maximum hourly rate for work conducted in this matter up to May 1, 2002, therefore is $112.50. After May 1, the maximum rate increased to $135. Plaintiffs argue that the PLRA does not apply to this case because plaintiffs include non-prisoners.

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for Ms. Easter 117.10 hours at an hourly rate of $125 and 95 hours at an hourly rate of $120. The total amount of those fees, plus costs is $ 794,204.27. Counsel has received interim payments totaling $ 224,036.92. Thus the total amount now sought by counsel is $ 570,167.35.

A. Attorneys fees and costs incurred prior to April 26, 1996

As an initial matter, the PLRA only was enacted on April 26, 1996. The Supreme Court has held that the statute's cap on attorneys' fees and costs does not apply to fees and costs incurred prior to its enactment. *See Hadix v. Martin*, 527 U.S. 343 (1999). The *Hadix* Court concluded that Section 803(d)(3) "does not clearly express congressional intent that it apply retroactively," *id* at 353-54, and that its retroactive application would upset attorneys' reasonable expectations that work they performed prior to enactment of the PLRA would be compensated at pre-PLRA rates. *Id.* at 358.

Although defendants have not raised this point, there is a factual distinction between *Hadix* and the present case which raises the issue of whether the *Hadix* Court's holding applies here. In *Hadix*, the Court issued an order well before the PLRA's enactment date recognizing the plaintiffs as prevailing parties entitled to reasonable fees.[2] In the present matter, in comparison,

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[2]The fee dispute in *Hadix* arose out of two class action lawsuits challenging the conditions of confinement in the Michigan prison system. *Hadix*, 527 U.S. at 347. The first case, *Glover v. Johnson*, was filed in 1977. The district court entered a final order in 1981 finding for the plaintiffs and detailing specific actions to be undertaken by defendants. In 1982 the court issued an order finding that the plaintiffs were "prevailing parties" and were entitled to attorneys' fees under 42 U.S.C. § 1988, including postjudgment monitoring fees. *Id.* at 348. The second case, *Hadix v. Johnson*, was filed in 1980. Five years later the parties entered into a consent decree. In November 1987, the district court entered an order awarding attorneys' fees to the plaintiffs, including postjudgment monitoring fees. In both cases, the district court held that the attorneys were entitled to fees at the

the Court awarded plaintiffs attorneys' fees and costs years *after* the PLRA's effective date. Other courts addressing this same factual distinction, however, have held that the holding in *Hadix* cannot fairly be read to be confined to its facts. *See Montcalm Publ'g Corp. v. Commonwealth of Virginia*, 199 F.3d 168, 172-73 (4th Cir. 1999)(noting that at the beginning and end of its opinion, the *Hadix* Court stated its holding in general terms without emphasis on the pre-existing fee award order); *see also Chatin v. Coombe*, 186 F.3d 82, 90 (2d Cir. 1999)(noting that "in *Hadix*, the Supreme Court ruled that, in a case filed prior to the effective date of the PLRA, § 803(d)(3) applied to legal work performed after the effective date, but not to legal work performed before it"); *Ilick v. Miller*, 68 F. Supp. 2d 1169, 1175 (D. Nev. 1999)(stating the rule that "prior section 1988 law applies to all fees billed up to the effective date of the PLRA . . . and that the PLRA fee cap applies to all fees billed after that date"). Following *Hadix* and these subsequent cases, the Court finds that the PLRA does not apply to fees and costs incurred in this matter prior to April 26, 1996.

B. Attorneys fees and costs incurred after the PLRA's enactment date

The PLRA expressly imposes limitations on the amount of attorneys' fees awarded "[i]n any action brought by a prisoner who is confined to any jail, prison, or other correctional facility." 42 U.S.C. § 1997e(d)(1). Relying on the District Court for the Southern District of Ohio's decision in *Turner v. Wilkinson*, 92 F. Supp. 2d 697 (S.D. Ohio 1999), plaintiffs argue that the PLRA's cap on attorneys' fees does not apply in the present case

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prevailing market rate. *Id.* at 348-49. The dispute before the Supreme Court involved whether the PLRA applied to the postjudgment monitoring fees.

because it does not apply to cases brought by prisoners and non-prisoners. Defendants argue that the *Turner* decision is contrary to the Supreme Court's decision in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), in which the Court held that when addressing the constitutional rights of prisoners, any impact on the rights of non-prisoners is derivative. Defendants also point to the Fourth Circuit's decision in *Montcalm*, in which the court held that the PLRA's cap on attorneys' fees applies in a suit filed by prisoners, even though a non-prisoner subsequently intervenes.

In *Montcalm,* prisoners initiated a lawsuit alleging that prison officials violated their First Amendment rights by preventing them from receiving *Gallery* Magazine because of its graphic, sexually explicit, and allegedly obscene content. *Montcalm*, 199 F.3d at 170. A year after the prisoners' *pro se* complaint was filed, Montcalm Publishing Corporation, the publisher of *Gallery*, intervened in the action, alleging that the prison's ban on its magazine violated its First Amendment and due process rights. *Id.* The district court rejected the plaintiffs' First Amendment claims, but found in favor of Montcalm on its due process claim. *Id* at 171.

The district court then awarded attorneys' fees to Montcalm as a prevailing party, but limited the request of the award sought pursuant to the PLRA.[3] *Id.* Montcalm appealed, arguing that the PLRA does not

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[3]The district court limited the award for fees and costs to work performed before, as well as after, the PLRA's enactment. *See Montcalm* 199 F.3d at 172. This portion of the court's order was reversed by the Fourth Circuit which held, as discussed above, that the PLRA does not limit fees and costs for work performed prior to the Act's effective date. *Id.* at 173.

limit attorneys' fees sought by nonprisoners. Montcalm relied on the legislative history of the PLRA in which various legislators stated that its purpose is to limit frivolous inmate litigation. *Id.* (citing 141 Cong. Rec. S14,317 (daily ed. Sept. 26, 1995)(statement of Sen. Abraham)). The Fourth Circuit noted that Montcalm's argument was not unreasonable in light of the statute's legislative history; but the court found this interpretation at odds with Section 803(d)(3)'s plain language. The court held that the language of the statute indicates Congress' clear intent "that statutory fee limits apply not 'solely to prisoners' but to 'any action brought by a prisoner.'" *Id.* at 172.

In *Turner*, an inmate and her husband filed an action against prison officials seeking declaratory and injunctive relief after the officials first granted, and then revoked, permission to allow the husband to attend the birth of the couple's child. *Turner*, 92 F. Supp. 2d at 699. After the court issued a restraining order and the prison officials permitted the husband to be present during the birth, the plaintiffs moved for attorneys' fees. The defendants challenged the amount sought by the plaintiffs arguing, *inter alia*, that it exceeded the maximum allowable under the PLRA. *Id.* at 700. The court held that the Act did not apply because the case was initially filed by a prisoner and a non-prisoner and thus could not be properly characterized as a suit "brought by a prisoner . . . " *Id.* at 704.

The *Turner* Court distinguished *Montcalm* on the ground that the suit initially was filed by both a prisoner and nonprisoner. The court reasoned:

> *Montcalm* makes sense in a case where the nature of the case is known at the time the intervenor's petition is filed, and the intervenor is therefore on notice that there will be a cap on attorneys' fees if the

> intervenor is successful on his or her claims. (The result "is dictated by [intervenor's] decision not to bring an independent action but to intervene in the prisoner's action,") . . .

Id. (quoting *Montcalm*, 199 F.3d at 172). The court noted that even if the suit could be characterized as one brought by a prisoner, "the presence of a non-prisoner plaintiff with non-frivolous claims makes it appropriate to determine whether the attorneys' fees are severable, so that a cap could be applied on those fees requested on behalf of [the prisoner] but not on behalf of [her non-prisoner husband]." *Id.* Because "[b]oth plaintiffs advanced non-frivolous claims for relief, and all of the work done was intended to address a single remedy benefitting both," the court held that the fees could not be separated and thus the cap would not be applied at all. *Id.*

Defendants argue that *Turner* is contrary to the Supreme Court's decision in *Thornburgh v. Abbott*, 490 U.S. 401 (1989). But *Abbott* did not address the PLRA's limitation on attorneys' fees and costs. In fact it did not address the PLRA at all. Rather, the issue before the *Abbott* Court was what standard of review should be applied to evaluate a First Amendment challenge to a prison regulation which impacts the rights of prisoners and non-prisoners– that is a standard of heightened or strict scrutiny or one that asks whether the actions of prison officials were "reasonably related to legitimate penological interests.[4] *Abbott*, 490 U.S. 408.

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[4] *Abbott* was initiated by federal inmates challenging a prison regulation governing their receipt of certain subscription publications. The regulation permitted prison officials to reject incoming publications found to be detrimental to institutional security. *Id.* at 404. Five years after the suit was filed, three publishers of

Defendants also cite the District Court for the Southern District of New York's unpublished decision in *Kozlowski v. Coughlin*, 2001 WL 1506010 (2001), to support their argument that the PLRA applies here. *Kozlowski*, however, addressed whether the PLRA's provision with respect to the termination of consent decrees, 18 U.S.C. § 3626, applies to prison conditions impacting prisoners and non-prisoners. The language of the consent decree provision, however, is far more expansive than the language of the attorneys' fees provision at issue here.

In *Kozlowski*, state prison inmates and their would-be visitors brought an action against the New York State Department of Correctional Services ("DOCS") challenging the constitutionality of DOCS' regulations pertaining to inmate visitation. *Kozlowski*, 2001 WL 1506010, at *1. After the district court found that the prisoners had a constitutionally protected liberty interest in receiving visitors of their choice, the parties negotiated procedures for visitation privileges which were embodied in a consent decree. *Id.* After Congress' enactment of the PLRA, DCOS moved to terminate the consent decree pursuant to 18 U.S.C. Section 3626(b)(2).

> That section provides, in relevant part:
> *In any civil action with respect to prison conditions*, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the

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publications banned by prison officials pursuant to the regulation were added as plaintiffs. *Id.* at 404 n.2.

> Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

18 U.S.C. § 3626(b)(2)(emphasis added). The section further defines the term "civil action with respect to prison conditions" as "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings . . ." 18 U.S.C. § 3626(g)(2). Based on this definition, the *Kozlowski* court held that Section 3626(b)(2) applies to any action involving "conditions of confinement" or "the effects of actions by government officials on the lives of persons confined in prison," regardless of whether people other than inmates are affected. The court concluded:

> The fact that people other than inmates are affected by the consent decree does not remove it from the scope of the PLRA without clear language in the statute to this effect. The statute does not limit the PLRA's reach to civil actions brought *solely* for the benefit of prison inmates. Indeed, such a statute would have an extremely narrow scope, since many actions relating to prison conditions also have repercussions outside of the prison system.

Id. *2. In comparison, 42 U.S.C. § 1997e(d) imposes limitations on the amount of attorneys' fees awarded only in actions "brought by a prisoner." Obviously if Congress intended to impose this limitation on any action respecting prison conditions, whether brought by prisoners or non-prisoners, it would have used broad language like that used in the consent decree provision. The Court therefore concludes that § 803(d)(3) of the

PLRA does not apply to limit attorneys' fees in this matter.

II. General Principles for Awarding Attorneys' Fees Pursuant to 42 U.S.C. § 1988

A. Determining Whether a Party is a "Prevailing Party"

In *Hensley v. Eckerhart*, 416 U.S. 424, 437 (1983), the Supreme Court provided the framework for determining attorney fee awards under Section 1988. First, as a threshold matter, a district court must determine whether the plaintiff is a "prevailing party." In this regard, the *Hensley* Court indicated that "[a] typical formulation is that 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit.'" *Id.* 461 U.S. at 433 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). Once plaintiffs have crossed this threshold, they are considered a "prevailing party" within the meaning of Section 1988 and are entitled to a fee award of some kind. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989). As the Supreme Court explained, "[t]he degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award *vel non*." *Id.* at 793.

B. Determining Whether Attorneys' Fees and Costs are "Reasonable"

Once a district court determines that the plaintiff is a "prevailing party," the court should apply certain principles to determine "what fee is 'reasonable.'" *Hensley*, 461 U.S. at 433. This inquiry begins with "an initial estimate of the value of a lawyer's services." *Id.*

This lodestar, or initial estimate, consists of the court's determination of "the number of hours reasonably expended . . . multiplied by a reasonable hourly rate." *Id.* The court's "reasonable fee" determination is informed by the twelve factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974). *Id.* at 433; *see also Blum v. Stenson*, 465 U.S. 886, 893 (1984).

The twelve *Johnson* factors are: "(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *Hensley*, 461 U.S. at 430 n.3 (citations omitted). District courts should eliminate hours which are excessive, redundant, or otherwise unnecessary. *Id.* at 434. The focus here is whether "a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Id.*

The *Hensley* Court went on to establish certain principles to guide district courts' decisions in setting fee awards in cases where the plaintiffs have not achieved complete success. These principles fall within the eighth factor set forth in *Johnson* -- "results obtained." In some situations, the Court instructed, district courts should not award fees for services unrelated to the successful claim. In other situations, the Court advised, the attorney should recover for all hours reasonably expended on the litigation. To determine which

approach is appropriate in a case, two questions must be addressed:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434.

With respect to the first question, the *Hensley* Court provided district courts with some guidance in determining whether the claims in a single lawsuit are related:

> In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants . . . counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been "expended in pursuit of the ultimate result achieved."

Id. at 434-35 (quoting *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444, at 5049 (C.D. Cal. 1974)). No fee should be awarded for services on unrelated claims which are unsuccessful. The *Hensley* Court advised, however, that more typically the claims will involve common facts and be interrelated and the Court should award fees for services on both claims:

> Many civil rights cases will present only a single claim. In other cases the plaintiff's

> claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Id.

III. Application

A. Whether Plaintiffs are a "Prevailing Party"

Plaintiffs filed their lawsuit to challenge the constitutionality of MDOC's new visitation procedures. Plaintiffs claimed the policies violated their First, Fourth, Eighth, Ninth, and Fourteenth Amendment rights.[5] In *Bazzetta II*, the Court struck down the procedures to the extent they restrict non-contact visits and permanently ban visitation for prisoners with two violations of MDOC's drug abuse policy, finding that the procedures violated plaintiffs' First, Eighth and Fourteenth Amendment rights. These were significant issues which achieved most of the relief plaintiffs sought in bringing their suit. Clearly this resolution changed

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[5]In their complaint, plaintiffs additionally alleged that the policies violated the Michigan Constitution. The Court, consistent with its usual practice when the parties are not diverse, dismissed plaintiffs' complaint based on the Michigan Constitution, as well as any state law claims. *See* Order filed 9/18/95.

the legal relationship between plaintiffs and defendants. Thus plaintiffs are a "prevailing party" within the meaning of Section 1988. The fact that plaintiffs did not prevail in *Bazzetta I* only affects, if anything, the amount of the fee award.

B. Whether Plaintiffs' Attorneys' Fees and Costs are Reasonable

When applied to this complex class action, the twelve factors outlined by the Supreme Court in *Johnson* suggest that plaintiffs' attorneys' fees and costs are reasonable. Clearly this case, which has spanned more than seven years, resulted in four published opinions, and includes numerous plaintiffs, required extensive time and labor by the attorneys and their staff. It involved complex constitutional issues and issues of first impression in this Circuit. *See Bazzetta I*, 124 F.3d at 770 (noting that Sixth Circuit has yet to decide whether prisoners have a First Amendment freedom of association right to visitation).

This case also demanded skilled attorneys with experience handling complex prisoner class actions, which counsel clearly had. Counsel has billed at hourly rates within the current market rates prevailing in the community for counsel with similar experience. *See id.* Ex. A ¶ 14; Ex. C ¶¶ 12 & 13; Ex. E. And these rates are comparable to awards in similar cases. *See id.* Ex. A ¶¶ 15, 16, 17; Ex. B ex. A.

Ms. LaBelle claims an hourly rate of $ 225 for her work as lead counsel in this case. Ms. LaBelle has been practicing law for twenty three years. *See* Mot. Ex. A ¶ 1. During that time, she has served as counsel in a number of class action lawsuits, including several cases involving the civil and constitutional rights of prisoners. *See id.* ¶¶ 4-8. In one of those cases, Ms. LaBelle was awarded $200 per hour for her work as co-counsel. A

number of professional organizations have recognized Ms. LaBelle for her work in prisoner rights cases. *See id.* ¶ 10.

Mr. Barnhart requests an hourly rate of $200, consistent with an award he previously received in a prisoner civil rights case in Michigan. Mr. Barnhart has practiced law for thirty four years. *See* Mot. Ex. B ¶ 6. Since 1970 he has specialized in class action civil rights litigation, including prisoner rights cases. *See id.*

Ms. Levine seeks an hourly rate of $160. Ms. Levine has been practicing law for twenty eight years. *See* Mot. Ex. C. ¶ 2. Throughout her career, Ms. Levine has represented indigent criminal defendants and prisoners. *See id.* ¶¶ 3-6 She has served as co-counsel and testified as an expert witness in prisoner rights cases and served on numerous boards and committees concerning prisoners' rights. *See id.* ¶¶ 8 & 10.

Ms. Streeter claims an hourly rate of $200. She has practiced law for twenty three years and has been active in prisoner civil rights litigation since 1982. *See* Mot. Ex. D. ¶¶ 5 & 7-10. In 1998 she was awarded $200 per hour for her work in *Hadix v. Johnson*. *See id.* ¶ 3.

Ms. LaBelle requests an hourly rate for Ms. Easter of $125. Mr. Barnhart claims an hourly rate for Ms. Easter of $120. Ms. Easter graduated law school in 1995 and has been involved in prisoner civil rights litigation since that time. *See* Mot. Ex. A. Ms. Easter was awarded an hourly rate of $130 for her work on one of those cases. *See id.* ¶ 16. She has presented a number of lectures on prison issues and, during law school, co-founded and coordinated the "Prisoner Legal Advocacy Project," in which students assisted attorneys in prisoner rights matters. *See id.*

With respect to the results obtained, plaintiffs initially filed their lawsuit in August 1995 to challenge

the implementation of MDOC's visitation procedures. The time spent on the case by the attorneys and their staff from 1995 forward cannot logically be separated according to work challenging the procedures as they impact contact visits and work focusing on the policies' impact on non-contact visits, even if the distinction was made by the courts in assessing the constitutionality of the policies.[6] Clearly plaintiffs obtained significant relief -- the Court struck down defendants' visitation policies with respect to non-contact visits and the permanent ban on visitation for prisoners with two or more substance abuse misconducts. That plaintiffs failed to convince the courts that these policies were unconstitutional with respect to contact visits does not detract from plaintiffs overall success. In fact, had defendants not misled this Court and the Court of Appeals in *Bazzetta I*– that its new regulations applied only to contact visits-- the result of that case may very well have been different.

Defendants raise five specific challenges to plaintiffs' request for fees and costs. *See* Defs.' Resp. to Pls.' Supp. Request. First defendants argue that 12.7

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[6]Furthermore, it is illogical to argue that services billed prior to June 26, 1998 (when plaintiffs won their motion for reinstatement) are unrelated to the claims on which plaintiffs' prevailed. Clearly many hours spent during that period contributed to plaintiffs' overall success. For example: the hours billed for preparation of the complaint (including, for example, reviewing MDOC's proposed policies, reviewing letters from potential plaintiffs, and researching legal theories); for preparing and presenting the motion for temporary restraining order (on which plaintiffs' prevailed); for certification of the class; and for preparing a supplemental petition to the Sixth Circuit after its affirmation in *Bazzetta I*.

hours in fees and $441.37 in costs are "unreasonable and excessive." *See* Resp. to Supp. Mot. at 4. Defendants, however, do not specify to what work these hours relate. Defendants may not make generalized, unsupported objections to the reasonableness of fees. *See Wooldridge v. Marlene Indus. Corp.*, 898 F.2d 1169 (6th Cir. 1990).

Defendants did file the affidavit of James P. Schratz, who evaluated plaintiffs' attorneys' fees and costs and found specific work excessive. *See* Decl. filed 5/16/02. Defendants however did not specifically refer to Mr. Schratz' affidavit in their response to plaintiffs request for fees. Mr. Schratz, however, did testify at the motion's hearing. Thus the Court only will address the objections he addressed at the hearing. At the hearing, Mr. Schratz argued that plaintiffs' fees and costs were unreasonable because counsel billed excessively for conferencing, trial preparation time, and trial attendance. Mr. Schratz acknowledged, however, that determining what is excessive is a judgment call, depending in part on the complexity of the case, the number of witnesses and exhibits, and the length of the trial.

With respect to excessive time billed for trial attendance, Mr. Schratz opined that only counsel who actually participated in the trial on a given day should bill for their services. Thus if Mr. Barnhart was present at counsel's table but did not examine a witness on a particular day, he should not bill for his time that day. Mr. Schratz, however, provides no caselaw to indicate that such billing is unreasonable. In light of the complexity of the case, the extensive number of exhibits that needed to be managed, and the uncertainty at trial as to how long a witness would be on the stand, the Court does not find such billing unreasonable. Nor, for the same reasons, does the Court find the trial preparation time or trial attendance time unreasonable.

Defendants' second objection is directed at plaintiffs' attorneys' fees and costs for work preparing the fee petitions and responding to defendants' objections to their requests. Their third objection is to the attorneys' fees and costs related to the amicus curiae briefs filed on appeal in this case. *See* Resp. to Supp. Mot at 4. Such work, however, is compensable. *See Northcross v. Bd. of Educ. of Memphis City Sch.*, 611 F.2d 624, 637 (6th Cir. 1979)(holding that plaintiffs should recover attorneys' fees for services relating to the appeals and for the time spent litigating the fees issue itself); *Weisenberger v. Huecker*, 593 F.2d 49 (6th Cir. 1979)(same); *Coleman v. Block*, 589 F. Supp. 1411, 1419 (D.C. N.D. 1984)(finding that plaintiffs were entitled to recover fees for *amicus* representation in case which was crucial to plaintiffs' success in case before court).

Defendants next object to 57.8 hours in fees for work "related to the Plaintiff class, i.e. review of and response to correspondence regarding status of case, incidents of reinstatement of visits, and Court's Order of Compliance." Services related to reasonable monitoring of a court's decisions, in order to ensure compliance and that the plan is working to correct constitutional violations, are compensable. *See Northcross*, 611 F.2d at 637. Counsel's time spent corresponding with their clients also is compensable, as Congress made clear when it enacted the Fee Awards Act that counsel should be paid "as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter." *Id.* at 636.

Finally, defendants object to time entries for conferencing between co-counsel for which there is no corresponding time billed by the other conferencing attorney(s). On its face, it appears that defendants are arguing that the attorney who billed for the conference should not be reimbursed if the other attorney(s) did not also bill for the same time. If this is defendants'

argument, it is frivolous. Perhaps counsel only billed for one of the attorneys in the conference in order to avoid being duplicitous. If defendants' argument instead is that fees for conferencing are not compensable, the courts consistently have rejected this objection. *See, e.g., Glover v. Johnson*, 934 F.2d 703, 716-17 (6th Cir. 1991); *Glover v. Johnson*, 138 F.3d 229, 251-52 (6th Cir. 1998). The amount of hours billed for conferencing is not otherwise unreasonable.

IV. Summary

In summary, the Court finds that the attorneys' fees and costs plaintiffs request are reasonable. The number of hours the attorneys expended is reasonable in light of the complexity of this litigation, particularly the vastness of the class and constitutional issues involved. The Court finds no reason to deduct fees and costs for services incurred prior to June 26, 1998, as services performed prior to that date were related to the claims on which plaintiffs ultimately prevailed and because the relief obtained by plaintiffs is significant.

With respect to the reasonableness of the hourly rates requested by counsel, the Court concludes that the PLRA does not apply to this action brought by a class of both prisoners and nonprisoners. Counsel thus should be awarded their requested hourly rates, provided such rates are reasonable. The Court finds that the rates requested are reasonable considering the training, background, experience, and skill of the individual attorneys and because the rates are within the fair market value of the services provided in the community and awards in similar cases.

Being fully advised in the premises, having read the pleadings, and for the reasons set forth above, the Court hereby orders as follows:

Plaintiffs' motion for attorneys' fees is **granted**;

The Court awards plaintiffs attorneys' fees and costs totaling $ 570,167.35, plus interest.

s/ Nancy G. Edmunds
Nancy G. Edmunds
U. S. District Judge

Dated: 8/19/2002

NOT RECOMMENDED FOR PUBLICATION

NO. 01-1635

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MICHELLE BAZZETTA, STACY BARKER, TONI BUNTON, DEBRA KING, SHANTE ALLEN, ADRIENNE BRANAUGH, ALESIA BUTLER, TAMARA PRUDE, SUSAN FAIR, VALERIE BUNTON, and ARTURO BUNTON, through his next friend Valerie Bunton, on behalf of themselves and all others similarly situated,	)	
Plaintiffs-Appellees	)	ORDER VACATING and REMANDING
v.	)	
KENNETH McGINNIS, Director of Michigan Department of Corrections and MICHIGAN DEPARTMENT OF CORRECTIONS,	)	
Defendants-Appellants	)	

BEFORE: MERRITT, CLAY and GILMAN, Circuit Judges.

In the above-styled case the Supreme Court of the United States on June 16, 2003, reversed the decision of this Court holding that certain Michigan prison regulations were invalid on their face, but also

reserving any argument that "an individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards" would pass muster under the First and Eighth Amendments as incorporated by the Fourteenth Amendment. In light of the Supreme Court's holding in this case, the previous judgment of this Court is vacated and the case remanded to the District Court for further consideration in light of the Supreme Court opinion.

Accordingly, it is so ORDERED.

ENTERED BY ORDER OF THE COURT

s/Leonard Green

Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZZETTA, STACY BARKER, TONI BUNTON, DEBRA KING, SHANTE ALLEN, ADRIENNE BRANAUGH, ALESIA BUTLER, TAMARA PRUDE, SUSAN FAIR, VALERIE BUNTON and ARTURO BUNTON, through his Next Friend VALERIE BUNTON,

Plaintiffs,

Case No. 95-73540

HON. NANCY G. EDMUNDS

v.

KENNETH McGINNIS, DIRECTOR OF MICHIGAN DEPARTMENT OF CORRECTIONS; MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendants.
_____/

CORRECTED PROOF OF SERVICE

The undersigned certifies that on November 4, 2003, she served a copy of **Defendants' Motion to Place Attorney Fees in Escrow and Brief in Support** upon the attorneys of record in the above cause by mailing the same first-class mail with postage fully prepaid, plainly addressed as follows:

DEBORAH LABELLE
221 N. MAIN ST STE 300
ANN ARBOR MI 48104

MICHAEL BARNHART
615 GRISWOLD ST STE 925
DETROIT MI 48226

PATRICIA STREETER
221 N MAIN ST STE 300
ANN ARBOR MI 48104

BARBARA LEVINE
PO BOX 420
GRAND LEDGE MI 48837

Said envelopes were misplaced and did not get mailed on October 31, 2003 as originally stated.

s/Mary Zischke
Legal Secretary

Subscribed and sworn to before me
this 5th day of November, 2003.

s/Brenda Lynn Barton
Brenda Lynn Barton, Notary Public
Clinton County, Michigan
Acting in Ingham County, Michigan
My Commission Expires: July 11, 2004
Friedman/1995052460A/Pldgs/POS.cor

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZZETTA, STACY BARKER, TONI BUNTON, DEBRA KING, SHANTE ALLEN, ADRIENNE BRANAUGH, ALESIA BUTLER, TAMARA PRUDE, SUSAN FAIR, VALERIE BUNTON and ARTURO BUNTON, through his Next Friend VALERIE BUNTON,

Plaintiffs,

v.

KENNETH McGINNIS, DIRECTOR OF MICHIGAN DEPARTMENT OF CORRECTIONS; MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendants.
_____/

Case No. 75-[illegible]3540

HON. NANCY G. EDMUNDS

PROOF OF SERVICE

The undersigned certifies that on October 31, 2003, she served a copy of Defendants' Motion to Place Attorney Fees in Escrow and Brief in Support upon the attorneys of record in the above cause by mailing the same first-class mail with postage fully prepaid, plainly addressed as follows:

DEBORAH LABELLE
221 N. MAIN ST STE 300
ANN ARBOR MI 48104

MICHAEL BARNHART
615 GRISWOLD ST STE 925
DETROIT MI 48226

PATRICIA STREETER
221 N MAIN ST STE 300
ANN ARBOR MI 48104

BARBARA LEVINE
PO BOX 420
GRAND LEDGE MI 48837

s/Mary Zischke
Legal Secretary

Subscribed and sworn to before me
this 31st day of October, 2003,

s/Brenda Lynn Barton
Brenda Lynn Barton, Notary Public
Clinton County, Michigan
Acting in Ingham County, Michigan
My Commission Expires: July 11,2004
Friedman/1995052460A/Pldgs/POS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZZETTA, STACY BARKER, TONI BUNTON, DEBRA KING, SHANTE ALLEN, ADRIENNE BRANAUGH, ALESIA BUTLER, TAMARA PRUDE, SUSAN FAIR, VALERIE BUNTON and ARTURO BUNTON, through his Next Friend VALERIE BUNTON,

Plaintiffs,

v.

KENNETH McGINNIS, DIRECTOR OF MICHIGAN DEPARTMENT OF CORRECTIONS; MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendants.
_____/

Case No. 95-73540

HON. NANCY G. EDMUNDS

DEFENDANTS' MOTION TO PLACE ATTORNEY FEES IN ESCROW AND BRIEF IN SUPPORT

Defendants, Kenneth McGinnis and the Michigan Department of Corrections (MDOC), through their attorney, Lisa C. Ward, Special Assistant Attorney General, hereby request that this Court enter an order requiring Plaintiffs to place all attorney fees paid by Defendants pursuant to this Court's June 27, 2002 order, with interest, in an escrow account until such time as this Court has resolved the prevailing party issue.

1. On June 27, 2002, this Court entered its Order for Payment of Interim Attorney Fees, wherein it required Defendants to pay Plaintiffs $223,991.92 as a partial payment for attorney fees and costs in this case, while the parties litigated the remaining issues concerning Plaintiffs' motion for attorney fees. At the time of this Court's order, Defendants requested that the money being paid pursuant to the June 27, 2002 order be placed in an escrow account until such time as the United States Supreme Court had ruled on Defendants' Petition for Writ of Certiorari. (See Attachment 1.)

2. After Defendants' request for an escrow account was ignored, on July 8, 2003, Plaintiffs received checks from Defendants in the following amounts: Deborah LaBelle received $102,154.68; Michael Barnhart received $63,173.11; Patricia Streeter received $38,750.34; and Barbara Levine received $35,582.70. (See Attachment 2.) In addition, on August 19, 2002, this Court also entered its Order Granting Plaintiffs' Motion for Attorney Fees and ordered Defendants to pay Plaintiffs an additional $570,167.35. Defendants timely filed a notice of appeal of the Court's August 19, 2002 order on August 28, 2002.

3. As this Court is already aware, on October 24, 2003, the United States Court of Appeals for the Sixth Circuit issued an Order remanding Defendants' appeal of this Court's August 28, 2002 Order Granting Plaintiffs' Motion for Attorney Fees for further consideration of the prevailing party issue in light of the Supreme Court's opinion in *Overton v. Bazzetta*, 123 S. Ct. 2162 (2003). Thus, given that Plaintiffs are not the prevailing parties in this case, they are no longer entitled to attorney fees pursuant to 42 U.S.C. § 1988. Therefore, Defendants request that any money paid to Plaintiffs pursuant to this Court's

June 27, 2002 order, including interest, be placed in an escrow account until such time as this Court has resolved the prevailing party issue.

WHEREFORE, for the above-stated reasons Defendants, Kenneth McGinnis and the Michigan Department of Corrections, hereby request that this Court enter an order requiring Plaintiffs to place all attorney fees paid by Defendants pursuant to this Court's June 27, 2002 order, with interest, in an escrow account until such time as this Court has resolved the prevailing party issue.

Respectfully submitted,

Michael A. Cox
Attorney General

Leo H. Friedman
Assistant-in-Charge
Corrections Division
P.O. Box 30217
Lansing, MI 48909
(517) 335-7021

s/Lisa C. Ward
Lisa C. Ward (P38933)
Special Assistant Attorney General
1300 North Waverly, #1
Lansing, Michigan 48917
(517) 323-0300

Dated: October 31, 2003
Friedman/Bazzetta/1995052460A/Pldgs/Mot Atty Fees Escrow

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

WILLIAM J. RICHARDS
Deputy Attorney General

P.O. BOX 30217
LANSING, MICHIGAN 48909

JENNIFER MULHERN GRANHOLM
ATTORNEY GENERAL

June 17, 2002

VIA FACSIMILE
AND U.S. MAIL

Deborah LaBelle
Attorney at Law
221 N. Main Street, Suite 300
Ann Arbor, Michigan 48104

Dear Ms. LaBelle:

Re: *Barzetta v. McGinnis*
USDC-ED No. 95-CV-73540-DT

I am writing as a follow-up to the Court's discussion of June 13, 2002 regarding an interim order of attorney fees and costs. Based on a review of Mr. Schratz's May 14, 2002 Declaration, Defendants are prepared to agree to the following:

1. Defendants will send the Court a check in the amount of $223,991.92, which represents the attorney fees and costs that are not in dispute.

2. Defendants request that this money be placed in an escrow account by the Court until such time as the United States Supreme Court has ruled on Defendants' Petition For Writ Of Certiorari.

Defendants submit that this proposal is the only way to insure that, in the event Defendants prevail in their appeal to the Supreme Court, the taxpayers of the State of Michigan are reimbursed for any attorney fees and costs wrongly paid to Plaintiffs. Please let me know immediately if this proposal is satisfactory to Plaintiffs.

Very truly yours,

Leo H. Friedman
Assistant in Charge
Corrections Division

Lisa C. Ward
Special Assistant Attorney General

LCW/mz
c: Hon. Nancy G. Edmunds
Friedman/1995052460A/corr/LaBelle 061702

Attachment 1

ATTY GEN CORR Fax:517-335-7157 -69a-

** Transmit Conf. Report **

P.1 Jun 17 '02 15:17

Telephone Number	Mode	Start	Time	Pages	Result	Note
9-/17347692196	NORMAL	17.15:16	0'41"	2	* O K	

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

WILLIAM J. RICHARDS
Deputy Attorney General

P.O. Box 30217
LANSING, MICHIGAN 48909

JENNIFER MULHERN GRANHOLM
ATTORNEY GENERAL

FAX COVER SHEET

DATE: June 17, 2002

TO: Deborah LaBelle
Attorney at Law

FAX NO: (734) 769-2196

FROM: Lisa C. Ward
Special Assistant Attorney General
Corrections Division

OUR PHONE: (517) 335-7021
OUR FAX: (517) 335-7157

No. of pages, including cover page: 2

RE: Bazzetta v. McGinnis, et al
USDC Docket No: 95-cv-73540-DT

COMMENTS: Letter dated 6/17/02 to D. LaBelle from L. Ward. Original will follow via U.S. Mail.

ATTY GEN CORR Fax:517-335-7157 -70a-

*** Transmit Conf. Report ***

P.1 Jun 17 '02 15:18

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9-/13132345393	NORMAL	17.15:17	0'41"	2	* O K	

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

WILLIAM J. RICHARDS
Deputy Attorney General

P.O. Box 30217
LANSING, MICHIGAN 48909

JENNIFER MULHERN GRANHOLM
ATTORNEY GENERAL

FAX COVER SHEET

DATE: June 17, 2002

TO: Honorable Nancy G. Edmunds
U.S. District Court
for the Eastern District of Michigan

FAX NO: (313) 234-5393

FROM: Lisa C. Ward
Special Assistant Attorney General
Corrections Division

OUR PHONE: (517) 335-7021
OUR FAX: (517) 335-7157

No. of pages, including cover page: 2

RE: Bazzetta v. McGinnis, et al
USDC Docket No: 95-cv-73540-DT

COMMENTS: Letter dated 6/17/02 to D. LaBelle from L. Ward. Original will follow via U.S. Mail.

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

WILLIAM J. RICHARDS
Deputy Attorney General

P.O. Box 30217
LANSING, MICHIGAN 48909

JENNIFER MULHERN GRANHOLM
ATTORNEY GENERAL

July 8, 2002

Deborah LaBelle
Attorney at Law
221 N. Main Street, Suite 300
Ann Arbor, MI 48104

Dear Ms. LaBelle:

Re: *Bazzetta v. McGinnis*
USDC-ED No. 95-CV-73540-DT

Enclosed pursuant to the Court's Order of June 27, 2002, is a check for attorney fees in the amount of $102,154.68.

Very truly yours,

Mark Matus IKS

Mark W. Matus
Assistant Attorney General
Corrections Division

MWM:kjs
Enclosure

Friedman/1995052460A/corr/Ltr LaBelle 070802

Attachment 2

006788 -72a- 000 214582393

PAGE 1 OF 1

STATE OF MICHIGAN REMITTANCE ADVICE

INVOICE NUMBER	INVOICE DATE	INVOICE DESCRIPTION	REF. DOC.	CURRENT DOC.	AMOUNT
488	072	DEPT OF CORR-FISC MGMT (517)373-3800			
95-CV-73560-DT		M.RAZZETTA V K. MCGINNIS,ET AL		VT209639	$ 102,154.68

WARRANT AMOUNT $ 102,154.68

DETACH HERE - RETAIN STUB FOR YOUR RECORDS - DETACH HERE

JOHN ENGLER, GOVERNOR 000 214582393

STATE OF MICHIGAN

VENDOR NO. MC 488 AGENCY 000 BANK ID 020706 ACCTG 07/08/2002 74-70 724

ONE HUND TWO THOUS ONE HUND FIFTY-FOUR & 68/100 **********DOLLARS $***102,154.68

006788

PAY TO THE ORDER OF:

DEBORAH LABELLE
221 N. MAIN ST STE 300
ANN ARBOR MI 48104

DOUGLAS B. ROBERTS, STATE TREASURER

PLEASE REMOVE THIS PORTION BEFORE CASHING

THE ENDORSEMENT OF THIS DOCUMENT CONSTITUTES ONE ENDORSEMENT - UNLESS TONE CHECKED - VIEW LIGHT TO DARK

⑈214582393⑈ ⑆072400706⑆ 000⑈

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BEST AVAILABLE COPY

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

WILLIAM J. RICHARDS
Deputy Attorney General

P.O. BOX 30217
LANSING, MICHIGAN 48909

JENNIFER MULHERN GRANHOLM
ATTORNEY GENERAL

July 8, 2002

Michael Barnhart
Attorney at Law
615 Griswold Street, Suite 925
Detroit, MI 48226

Dear Mr. Barnhart:

Re: *Bazzetta v. McGinnis*
USDC-ED No. 95-CV-73540-DT

Enclosed pursuant to the Court's Order of June 27, 2002, is a check for attorney fees in the amount of $63,173.11.

Very truly yours,

Mark Matus /KS

Mark W. Matus
Assistant Attorney General
Corrections Division

MWM:kjs
Enclosure

Friedman/1995052460A/corr/Ltr Barnhart 070102

006790

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PAGE 1 OF 1

STATE OF MICHIGAN REMITTANCE ADVICE

INVOICE NUMBER	INVOICE DATE	INVOICE DESCRIPTION	REF. DOC.	CURRENT DOC.		AMOUNT
458 472 DEPT OF CORR-FISC MGMT (517)373-3000						
01-CV-73540-DT		M.BAZZETTA V K. MCGINNIS,ET AL		VP209843	$	63,173.11

WARRANT AMOUNT $ 63,173.11

NON-NEGOTIABLE NON-NEGOTIABLE NON-NEGOTIABLE

NON-NEGOTIABLE NON-NEGOTIABLE NON-NEGOTIABLE

DETACH HERE - RETAIN STUB FOR YOUR RECORDS - DETACH HERE

JOHN ENGLER, GOVERNOR 000 214582395

STATE OF MICHIGAN

VENDOR NO.	MC	AGENCY	BANK ID	ACCT'G
		458	000	020706

07/08/2002

SIXTY-THREE THOUS ONE HUND SEVENTY-THREE & 11/100 ******DOLLARS $****63,173.11

006790

MICHAEL BARNHART
615 GRISWOLD ST STE 925
DETROIT MI 48226

DOUGLAS ROBERTS, STATE TREASURER

'214582395" :072400706: 000"

PLEASE REMOVE THIS PORTION BEFORE CASHING

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

WILLIAM J. RICHARDS
Deputy Attorney General

P.O. Box 30217
LANSING, MICHIGAN 48909

JENNIFER MULHERN GRANHOLM
ATTORNEY GENERAL

July 8, 2002

Patricia A. Streeter
Attorney at Law
221 N. Main Street, Suite 300
Ann Arbor, MI 48104

Dear Ms. Streeter:

Re: *Bazzetta v. McGinnis*
USDC-ED No. 95-CV-73540-DT

Enclosed pursuant to the Court's Order of June 27, 2002, is a check for attorney fees in the amount of $38,750.34.

Very truly yours,

Mark Matus /kjs

Mark W. Matus
Assistant Attorney General
Corrections Division

MWM:kjs
Enclosure

Friedman/199505246OA/corr/l tr Streeter 070802

006789

000 21458239

PAGE 1 OF 1

STATE OF MICHIGAN REMITTANCE ADVICE

INVOICE NUMBER	INVOICE DATE	INVOICE DESCRIPTION	REF. DOC.	CURRENT DOC.	AMOUNT
468	472 DEPT OF CORR-FISC MGMT (517)373-3300				
95-CY-73540-DT		N.BAZZETTA V K.MCGINNIS,ET AL		VP209843 $	38,750.34

WARRANT AMOUNT $ 38,750.34

NON-NEGOTIABLE NON-NEGOTIABLE

NON-NEGOTIABLE NON-NEGOTIABLE

DETACH HERE - RETAIN STUB FOR YOUR RECORDS - DETACH HERE

JOHN ENGLER, GOVERNOR

000 214582394

STATE OF MICHIGAN

VENDOR NO.	MI	468 AGENCY	000 BANK ID	020708 ACCT'G	07/08/2002

THIRTY-EIGHT THOUS SEVEN HUND FIFTY & 34/100 **********DOLLARS $****38,750.34

006789

PATRICIA STREETER
221 N. MAIN ST STE 300
ANN ARBOR MI 48104

PAY TO THE ORDER OF

STATE TREASURER'S WARRANT

DOUGLAS B. ROBERTS, STATE TREASURER

⑈214582394⑈ ⑆072400706⑆ 000⑈

THE BACK OF THIS DOCUMENT CONTAINS AN ARTIFICIAL WATERMARK — HOLD AT AN ANGLE TO VIEW

PLEASE REMOVE THIS PORTION BEFORE CASHING

BEST AVAILABLE COPY

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

WILLIAM J. RICHARDS
Deputy Attorney General

P.O. Box 30217
LANSING, MICHIGAN 48909

JENNIFER MULHERN GRANHOLM
ATTORNEY GENERAL

July 8, 2002

Barbara Levine
Attorney at Law
P.O. Box 420
Grand Ledge, MI 48837

Dear Ms. Levine:

Re: *Bazzetta v. McGinnis*
USDC-ED No. 95-CV-73540-DT

Enclosed pursuant to the Court's Order of June 27, 2002, is a check for attorney fees in the amount of $35,582.70.

Very truly yours,

Mark Matus / KS

Mark W. Matus
Assistant Attorney General
Corrections Division

MWM:kjs
Enclosure

Friedman/199505246CA/corr/Ltr Levine 070802

006791

000 2145824

PAGE 1 OF 1

STATE OF MICHIGAN REMITTANCE ADVICE

INVOICE NUMBER	INVOICE DATE	INVOICE DESCRIPTION	REF. DOC.	CURRENT DOC.	AMOUNT
488 472 DEPT OF CORR-FISC MGMT (517)373-3800					
95-CV-73540-DT		M.BAZZETTA V E.MORRIS, ET AL		7Y209844	$ 35,582.70

WARRANT AMOUNT $ 35,582.70

NON-NEGOTIABLE NON-NEGOTIABLE NON-NEGOTIABLE

NON-NEGOTIABLE NON-NEGOTIABLE NON-NEGOTIABLE

DETACH HERE - RETAIN STUB FOR YOUR RECORDS - DETACH HERE

JOHN ENGLER, GOVERNOR 000 214582402

STATE OF MICHIGAN

VENDOR NO. MC 488 AGENCY 000 BANK ID 026708 ACCT NO. 07/08/2002

THIRTY-FIVE THOUS FIVE HUND EIGHTY-TWO & 70/100 ********** DOLLARS $****35,582.70

006791

ORDER OF:

BARBARA LEVINE
PO BOX 420
GRAND LEDGE MI 48837

DOUGLAS B. ROBERTS, STATE TREASURER

214582402 ⑆072400706⑆ 000

THE BACK OF THIS DOCUMENT CONTAINS AN ARTIFICIAL WATERMARK. HOLD AT AN ANGLE TO VIEW.

PLEASE REMOVE THIS PORTION BEFORE CASHING

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZZETTA, STACY BARKER, TONI BUNTON, DEBRA KING, SHANTE ALLEN, ADRIENNE BRANAUGH, ALESIA BUTLER, TAMARA PRUDE, SUSAN FAIR, VALERIE BUNTON and ARTURO BUNTON, through his Next Friend VALERIE BUNTON,

Plaintiffs,

v.

KENNETH McGINNIS, DIRECTOR OF MICHIGAN DEPARTMENT OF CORRECTIONS; MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendants.
_____/

Case No. 95-73540

HON. NANCY G. EDMUNDS

PROOF OF SERVICE

The undersigned certifies that on November 21, 2003, she served a copy of **Defendants' Reply in Support of Motion to Place Attorney Fees in Escrow** upon the attorneys of record in the above cause by mailing the same first-class mail with postage fully prepaid, plainly addressed as follows:

DEBORAH LABELLE
221 N. MAIN ST STE 300
ANN ARBOR MI 48104

MICHAEL BARNHART
615 GRISWOLD ST STE 925
DETROIT MI 48226

PATRICIA STREETER
221 N MAIN ST STE 300
ANN ARBOR MI 48104

BARBARA LEVINE
PO BOX 420
GRAND LEDGE MI 48837

s/Mary F. Zischke
Legal Secretary

Subscribed and sworn to before me
this 21st day of November, 2003,

s/Brenda Lynn Barton
Brenda Lynn Barton, Notary Public
Clinton County, Michigan
Acting in Ingham County, Michigan
My Commission Expires: July 11,2004
Friedman/1995052460A/Pldgs/POS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZZETTA, STACY BARKER, TONI BUNTON, DEBRA KING, SHANTE ALLEN, ADRIENNE BRANAUGH, ALESIA BUTLER, TAMARA PRUDE, SUSAN FAIR, VALERIE BUNTON and ARTURO BUNTON, through his Next Friend VALERIE BUNTON,

Plaintiffs,

Case No. 95-73540

v.

HON. NANCY G. EDMUNDS

KENNETH McGINNIS, DIRECTOR OF MICHIGAN DEPARTMENT OF CORRECTIONS; MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendants.
_____/

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO PLACE ATTORNEY FEES IN ESCROW

Defendants, Kenneth McGinnis and the Michigan Department of Corrections ("MDOC"), through their attorney, Lisa C. Ward, Special Assistant Attorney General, hereby file their Reply in Support of Motion to Place Attorney Fees in Escrow, which was filed with this Court on October 31, 2003. In support of their reply, Defendants state as follows:

1. On October 24, 2003, the Sixth Circuit issued an Order remanding Defendants' appeal of this

Court's August 19, 2002 Order Granting Plaintiffs' Motion for Attorney Fees. In their October 24, 2003 Order, the Sixth Circuit ruled that Plaintiffs' status as the prevailing party in this case should be reconsidered by this Court in light of the Supreme Court's opinion in *Overton v. Bazzetta*, 123 S. Ct. 2162 (2003).

2. Defendants' Motion to Place Attorney Fees in Escrow was filed by Defendants on October 31, 2003. In their motion, Defendants requested that this Court enter an order requiring Plaintiffs to place the $223,991.92 they have already received from Defendants, with interest, in an escrow account until such time as this Court has resolved the prevailing party issue.

3. On November 12, 2003, Plaintiffs filed their Response opposing Defendants' motion, wherein they argue that because Defendants complied with this Court's June 27, 2002 Order for Payment of Interim Attorney Fees, they have given up their right to contest Plaintiffs' status as a prevailing party in this case. Not only do Plaintiffs misrepresent the record in this case, but acceptance of their argument would lead to an absurd result. It is Plaintiffs' position that in spite of the unanimous reversal of the lower court rulings in this case by the Supreme Court in *Overton, supra*, they are still the prevailing party in this litigation.

4. As this Court is already aware, under 42 U.S.C. § 1983, the determination as to whether Plaintiffs are a prevailing party is a threshold determination that must be made prior to the award of any attorney fees. *Hensley v. Eckerhart,* 416 U.S. 424 (1983). A review of the record in this case reveals that Defendants have raised the prevailing party issue at all times during this litigation and have only paid

interim attorney fees to Plaintiffs when ordered to do so by this Court. Therefore, given that Plaintiffs are not the prevailing party in this case, they are not entitled to attorney fees, and Defendants Motion to Place Attorney Fees in Escrow should be granted.

WHEREFORE, for the above-stated reasons and the reasons set forth in Defendants' Motion to Place Attorney Fees in Escrow, Defendants respectfully request that this Court enter an order requiring Plaintiffs to place all attorney fees paid by Defendants, with interest, in an escrow account until such time as this Court has resolved the prevailing party issue.

Respectfully submitted,

Michael A. Cox
Attorney General

Leo H. Friedman
Assistant-in-Charge
Corrections Division
P.O. Box 30217
Lansing, MI 48909
(517) 335-7021

s/Lisa C. Ward
Lisa C. Ward (P38933)
Special Assistant Attorney General
1300 N. Waverly, #1,
Lansing, MI 48917
(517) 323-0300

Dated: November 21, 2003

Friedman/Bazzetta/1995052460A/Plds/RepSupAttyFeesEscrow

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZZETTA, STACY BARKER, TONI BUNTON, DEBRA KING, SHANTE ALLEN, ADRIENNE BRANAUGH, ALESIA BUTLER, TAMARA PRUDE, SUSAN FAIR, VALERIE BUNTON and ARTURO BUNTON, through his Next Friend VALERIE BUNTON,

Plaintiffs,

Case No. 95-73540

v.

HON. NANCY G. EDMUNDS

KENNETH McGINNIS, DIRECTOR OF MICHIGAN DEPARTMENT OF CORRECTIONS; MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendants.
_____/

PROOF OF SERVICE

The undersigned certifies that on December 18, 2003, he/she served a copy of the following papers upon the attorneys of record in the above cause by mailing the same to his/her respective address, with first class postage fully prepaid thereon, said papers being described as follows:

(a) Defendants' Brief Regarding the Issue of Prevailing Party.

s/Pam Pung
Legal Secretary

Thom / 1995052460A / Pleadings / POS.Brf 12.18.03

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZZETTA, STACY BARKER, TONI BUNTON, DEBRA KING, SHANTE ALLEN, ADRIENNE BRANAUGH, ALESIA BUTLER, TAMARA PRUDE, SUSAN FAIR, VALERIE BUNTON and ARTURO BUNTON, through his Next Friend VALERIE BUNTON,

Plaintiffs,

Case No. 95-73540

v.

HON. NANCY G. EDMUNDS

KENNETH McGINNIS, DIRECTOR OF MICHIGAN DEPARTMENT OF CORRECTIONS; MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendants.
_____/

DEFENDANTS' BRIEF REGARDING THE ISSUE OF PREVAILING PARTY

Introduction

Defendants, Kenneth McGinnis and the Michigan Department of Corrections (MDOC), through their attorney, Lisa C. Ward, Special Assistant Attorney General, hereby submit their Brief Regarding the Issue of Prevailing Party pursuant to the Court's December 4, 2003 ruling.

Statement of the Case

On June 25, 2001, Plaintiffs filed their motion for attorney fees wherein they requested a total of $652,415.49 in attorney fees and costs. Subsequently, on July 11, 2001, Plaintiffs submitted a corrected brief and increased their request for attorney fees and costs to $660,479.49. Defendants' response in opposition to Plaintiffs' motion for attorney fees and costs was filed on August 7, 2001. In their response, Defendants objected to Plaintiffs' motion for attorney fees on the basis that they were not the prevailing party, that they were not entitled to attorney fees in excess of the PLRA rate, and that Plaintiffs' motion contained unreasonable fees and costs. On August 22, 2001, the district court issued an order holding Plaintiffs' motion for attorney fees in abeyance until such time as the Sixth Circuit issued its decision concerning the appeal of the case on the merits. *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813 (E.D. Mich. 2001).

After the Sixth Circuit issued its decision affirming the April 25, 2001 judgment of the district court in *Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir. 2002), on April 10, 2002, the district court scheduled a hearing on Plaintiffs' motion for attorney fees for July 23, 2002. Given that Defendants intended to offer expert testimony at the July 23, 2002 court hearing, on May 15, 2002, Defendants filed a declaration of James Schratz in support of Defendants' opposition to Plaintiffs' motion for attorney fees and costs. On June 7, 2002, Plaintiffs filed a statement requesting an additional amount of $133,552.88 in attorney fees and costs. After a June 17, 2002 telephone conference between the district court and the parties, on June 27, 2002, the court entered an order requiring Defendants

to pay Plaintiffs $223,991.92 as payment for interim attorney fees.[1]

On June 27, 2002, Plaintiffs filed a supplemental request for attorney fees through May 31, 2002. On July 16, 2002, Plaintiffs filed a corrected supplemental request for additional attorney fees and costs. On July 16, 2002, Defendants' response in opposition to Plaintiffs' supplemental request for attorney fees and costs through May 31, 2002 was filed with the district court. In their response, Defendants objected to Plaintiffs' hourly rate because it exceeded the maximum rate allowed under the PLRA, and Defendants objected to being billed for unreasonable attorney fees and costs. *Id.* On July 12, 2002, and July18, 2002, Plaintiffs filed reply briefs in support of their motion.

The district court held a hearing on Plaintiffs' motion for attorney fees on July 23, 2002. The only testimony offered at the July 23, 2002 was the testimony of James Schratz, an expert witness called by Defendants. In addition to the expert testimony of Mr. Schratz, on July 29, 2002, Defendants' reply in opposition to Plaintiffs' motion for attorney fees was filed with the district court. On August 19, 2002, the district court issued an Order granting Plaintiffs' motion for attorney fees and awarding Plaintiffs an additional $570,167.35 in fees and costs beyond those already paid pursuant to the district court's June 27,

---

[1] As set forth in the attached June 17, 2002 letter, at the time of Defendants' payment to Plaintiffs of interim attorney fees, Defendants requested that Plaintiffs put this money in an escrow account until such time as the Supreme Court ruled on Defendants' Petition for Writ of Certiorari. (See Exhibit 1)

2002 Order requiring payment of interim attorney fees.

Defendants' notice of appeal of the lower court's orders was timely filed on August 28, 2002. On June 16, 2003, the United States Supreme Court issued its unanimous decision reversing the lower courts' orders in this case. *Bazetta v. Overton,* 123 S.Ct. 2162 (2003). On October 24, 2003, the Sixth Circuit issued an order remanding the appeal back to the district court for the purpose of determining whether Plaintiffs are the prevailing party in this case in light of the Supreme Court decision in *Bazetta, supra.*

Argument

I. Plaintiffs are not entitled to any attorney fees and costs because they are not the prevailing parties in this case.

The attorney fees at issue in this appeal are governed by 42 U.S.C. § 1988, which provides that the court, in its discretion, may allow the prevailing party a reasonable attorney fee as part of costs. 42 U.S.C. § 1988(b). Exactly what constitutes a "prevailing party" has been the subject of much discussion by the courts over the years, including the United States Supreme Court. In *Hanrahan v. Hampton*, 446 U.S. 754 (1980), the Supreme Court determined that the phrase "prevailing party" was not intended to apply to the situation where a party has prevailed initially on some matters but has not established an entitlement to relief based on the merits of his/her claims. *Id.* at 757-758.

Subsequently, in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), the Supreme Court ruled that because the claimants had not succeeded on the actual

merits of their claim, they were not entitled to attorney fees under the Clean Air Act.

> While the foregoing treatments of fee-shifting differ in many respects, they reflect one consistent, established rule: a successful party need not pay its unsuccessful adversary's fees. The uniform acceptance of this rule reflects, at least in part, intuitive notions of fairness to litigants. Put simply, ordinary conceptions of just returns reject the idea that a party who wrongly charges someone with violations of the law should be able to force that defendant to pay the costs of the wholly unsuccessful suit against it. [*Id.* at 685.]

Although the Supreme Court specifically dealt with the attorney fee provision of the Clean Air Act in *Ruckelshaus*, *supra*, the Court also reviewed the other federal fee-shifting provisions. In *Ruckelshaus, supra*, the Court noted that the same requirement of awarding attorney fees only to a party that has prevailed on the merits of his/her claim is present in the other federal fee shifting statutes as well, including 42 U.S.C. § 1988. *Id.* at 684-685. *See also: Commissioner, Immigration and Naturalization Service, et. al. v. Marie Lucie Jean, et. al.*, 496 U.S.154 (1990), and *Fiarman v. Western Publishing Company*, 810 F.2d 85 (6th Cir. 1987).

With regard to the fee-shifting provision contained in 42 U.S.C. § 1988, the Supreme Court held in *Hewitt v. Helms*, 482 U.S. 755 (1987), that a party who litigates to judgment and loses on all his claims cannot be a prevailing party for purposes of an award of attorney fees.

> In order to be eligible for attorney fees under § 1988, a litigant must be a "prevailing party." Whatever the outer boundaries of that term may be, Helms does not fit within them. ... The most that he obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim. That is not the stuff of which legal victories are made. [*Id.* at 760.]

See: Rhodes v. Stewart, 488 U.S. 1 (1988). "The Court of Appeals misapprehended our holding in *Hewitt*. Although the plaintiff in *Hewitt* had not won a declaratory judgment, nothing in our opinion suggested that the entry of such a judgment in a party's favor automatically renders that party prevailing under § 1988." *Id.* at 3.

Recently, in *Buckhannon v. Board and Care Home, Inc., et. al. v. West Virginia Department of Health and Human Services, et. al.*, 532 U.S. 598 (2001), the Supreme Court determined that even if a plaintiff has achieved a desired result because the litigation brought about a voluntary change in the conduct of a defendant, the plaintiff is not a prevailing party and, thus, not entitled to attorney fees. Thus, the Supreme Court held that the "catalyst theory" is not a permissible basis for an award to attorney fees.

> A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents thus counsel against holding that the term "prevailing party" authorizes an award of attorney fees

> *without* a corresponding alteration in the legal relationship of the parties. [*Id.* at 605.]

See also: Toms v. Taft, 338 F.3d 519 (6th Cir. 2003).

This Sixth Circuit has also addressed the question of the meaning of the phrase "prevailing party" as used in various federal fee-shifting provisions. In *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), the Sixth Circuit noted that the question as to whether plaintiff has prevailed is a threshold determination that the court must make before deciding the amount of attorney fees to award to a successful plaintiff pursuant to 42 U.S.C. § 1988. *Id.* at 636. Subsequently, in *Crabtree v. Collins*, 900 F.2d 79 (6th Cir. 1990), the Sixth Circuit reversed a district court's order awarding attorney fees pursuant to 42 U.S.C. § 1988, on the basis that the plaintiff's claim was nonfrivolous.

> A plaintiff is a prevailing party within the meaning of Section 1988 if the plaintiff has succeeded on any significant issue in the litigation which achieved some of the benefits the parties sought in bringing the suit. . . . A prevailing party must have resolved the dispute in a manner that changes the legal relationship between itself and the defendant. . . . This change in legal relationships may be accomplished by obtaining some relief on the merits through a favorable judgment, or by obtaining a settlement. [*Id.* at 82.]

In *Crabtree, supra*, the plaintiff, a prisoner, had obtained a court order requiring that he be examined by a medical specialist; however, the court ultimately

granted defendant's motion to dismiss. After reviewing the record on appeal, the Sixth Circuit ruled that although plaintiff prevailed on some initial matters, he was not the prevailing party and, thus, not entitled to any attorney fees and costs.

Five years later, in a case that dealt with a fifteen-year-old civil rights employment dispute between the City of Detroit and the NAACP, the Sixth Circuit reversed the district court's award of attorney fees on the basis that although plaintiffs had prevailed on some interim orders, they were not prevailing parties under 42 U.S.C. § 1988. *NAACP, Detroit Branch v. Detroit Police Officers Assn*, 46 F.3d 528 (6th Cir. 1995).

> Therefore, even assuming for the sake of argument that the plaintiffs have received 'actual relief,' any relief they have received was not on the merits of their underlying claim. Therefore, the NAACP is not a prevailing party simply because the laid off police officers eventually returned to their jobs. The officers must have returned to their jobs as a direct result of a court order that was not subsequently reversed for error in order to have received actual relief on the merits of their claim. [*Id.* at 531.]

See also: Pouillon v. Little, 326 F.3d 713 (6th Cir. 2003) and *Fiarman v. Western Publishing Company*, 810 F.2d 85 (6th Cir. 1987).

In addition to the Sixth Circuit, several other circuit courts have also determined that just because plaintiffs have prevailed on some interim matters, this does not make them prevailing parties pursuant to 42 U.S.C. § 1988. *See: Krocka v. City of Chicago*, 203

F.3d 507, 518 (7th Cir. 2000) "Where a plaintiff has 'obtained benefits to which we now know he was never entitled,' the granting of that relief does not provide grounds for awarding attorney's fees." *Foreman v. Dallas County*, 193 F.3d 314 (5th Cir. 1999); *Palmer v. City of Chicago*, 806 F.2d 1316, 1320 (7th Cir. 1986) "The plaintiffs, we now know, have lost this case; and when a judgment on which an award of attorney's fees to the prevailing party is based is reversed, the award, of course, falls with it." *Doe v. Busbee*, 684 F.2d 1375, 1381 (11th Cir. 1982) "In view of the purpose behind the Attorney's Fees Award Act, we conclude that plaintiffs-appellees are not prevailing parties in this litigation. Their successes were merely temporary, and any benefit flowing from their successes in the district court was awarded under a mistake of law."

In its August 20, 2002 Order granting Plaintiffs' motion for attorney fees, this court relied on the fact that the Sixth Circuit affirmed the district court's ruling (*Bazzetta v. McGinnis*, 148 F. Supp. 813 (E.D. Mich. 2001)) in favor of Plaintiffs as to all claims, as the basis for ruling that Plaintiffs were the prevailing parties under 42 U.S.C. § 1988. However, there is absolutely no dispute that the Sixth Circuit's decision finding Defendants' visitation restrictions unconstitutional, *Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir. 2002), was reversed in its entirety by a unanimous ruling of the United States Supreme Court. *Overton v. Bazzetta*, 123 S. Ct 2162 (2003). Given that Defendants had already prevailed in the first part of this case, *Bazzetta v. McGinnis*, 124 F.3d 774 (6th Cir. 1997), and *Bazzetta v. McGinnis*, 133 F.3d 382 (6th Cir. 1998), there is absolutely no aspect of this case that has been determined in a manner favorable to Plaintiffs. Therefore, given that Plaintiffs have not prevailed on any part of this case, the August 19, 2002 Order granting Plaintiffs' motion for attorney fees in the amount of $794,204.27, which includes the

June 27, 2002 Order for interim attorney fees, must be vacated as a matter of law pursuant to 42 U.S.C. § 1988.

Conclusion

WHEREFORE, for the above-stated reasons, Defendants request that this Court vacate it's August 19, 2002 Order granting Plaintiffs' motion for attorney fees in the amount of $794,204.27, which includes the June 27, 2002 Order for interim attorney fees, pursuant to 42 U.S.C. § 1988.

Respectfully submitted,

Michael A. Cox
Attorney General

Leo H. Friedman
Assistant-in-Charge
Corrections Division
P.O. Box 30217
Lansing, MI 48909
(517) 335-7021

s/Lisa C. Ward
Lisa C. Ward (P38933)
Special Assistant Attorney General
1300 N. Waverly, #1
Lansing, MI 48917
(517) 323-0300

Dated: December 18, 2003

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

WILLIAM J. RICHARDS
Deputy Attorney General

P.O. Box 30217
LANSING, MICHIGAN 48909

JENNIFER MULHERN GRANHOLM
ATTORNEY GENERAL

June 17, 2002

VIA FACSIMILE
AND U.S. MAIL

Deborah LaBelle
Attorney at Law
221 N. Main Street, Suite 300
Ann Arbor, Michigan 48104

Dear Ms. LaBelle:

Re: *Bazzetta v. McGinnis*
USDC-ED No. 95-CV-73540-DT

I am writing as a follow-up to the Court's discussion of June 13, 2002 regarding an interim order of attorney fees and costs. Based on a review of Mr. Schratz's May 14, 2002 Declaration, Defendants are prepared to agree to the following:

1. Defendants will send the Court a check in the amount of $223,991.92, which represents the attorney fees and costs that are not in dispute.

2. Defendants request that this money be placed in an escrow account by the Court until such time as the United States Supreme Court has ruled on Defendants' Petition For Writ Of Certiorari.

Defendants submit that this proposal is the only way to insure that, in the event Defendants prevail in their appeal to the Supreme Court, the taxpayers of the State of Michigan are reimbursed for any attorney fees and costs wrongly paid to Plaintiffs. Please let me know immediately if this proposal is satisfactory to Plaintiffs.

Very truly yours,

Leo H. Friedman
Assistant in Charge
Corrections Division

Lisa C. Ward
Special Assistant Attorney General

LCW/mz
c: Hon. Nancy G. Edmunds
Friedman/1995052460A/corr/LaBelle 061702

DEFENDANT'S EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZZETTA, et al,

Plaintiffs,

v. CIVIL ACTION
NO. 95-73540

KENNETH MCGINNIS,
Director of Michigan
Department of Corrections, et al,

Defendants.
_____/

MOTION HEARING
BEFORE THE HONORABLE NANCY G. EDMUNDS
United States District Judge
226 Theodore Levin U.S. Courthouse
231 Lafayette Boulevard West
Detroit, Michigan
December 4. 2003

APPEARANCES:

MS. DEBORAH A. LABELLE, ESQ.,
MS. PATRICIA STREETER, ESQ
MR. MICHAEL BARNHART, ESQ.
In behalf of Plaintiffs

MS. LISA WARD, ESQ.
In behalf of Defendants.

Suzanne Jacques, CSR, RMR
Official Court Reporter – U.S. District Court
Phone: 313-234-5155

INDEX

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Defendant's Motion to Place Attorney Fees in Escrow	23

A particular application, not in the regulation on its face.

Last sentence, "Those issues are not presented in this case, which challenges the validity of the restriction on noncontact visits in all instances."

They didn't say those issues aren't presented in this appeal, they said in this case. They saw the third amended complaint the way they do. The fact of the matter is we do not have those findings of fact to rely on for some sort of remedial plan, and we take issue with that.

That's all I have. I'm available for any questions.

THE COURT: All right. Let's take up the motion to place the attorney fees in escrow. Well, let me short circuit that because I don't think I need argument on that.

I think there is a fair question with respect to whether the plaintiffs are entitled to be considered a prevailing party, and I think you need to brief that. You didn't really brief that. I don't think you're entitled to an escrow. You didn't challenge that 270 some thousand dollars in the first instance, and I'm not going to order them to escrow it now but I do think it's on the table, and if you want to brief what prevailing party means, that's fine with me.

MS. WARD: Your Honor, I would request, then, that we have a tight briefing schedule and be willing to have my brief on this subject in a week from Friday, because my client wants to deal with this issue as soon as possible, and I'm just giving you that for the record.

THE COURT: I knew money was tight at the state, but I didn't know –

MS. WARD: It's tighter than you know.

THE COURT: -- that the 224,000 would be that big a deal.

I don't know, it's the holidays. Truthfully, I'm not going to rule on this before the end of the year, so if you want to get your brief in by a week from Friday, that seems a little tight to me.

MS. WARD: My client's requested me to make the request that we get the papers in front of the judge in short order.

THE COURT: Okay. Short order sounds fine. But how about by, just file your cross motions, you don't need to file response and replies, and I'll ask you to file them by Friday, the 19th, not the 12th. And then I won't need further argument on it. I'll get something out to you within a couple of weeks.

MS. WARD: We would appreciate that, Your Honor and yes, for the record, money is very tight at the state.

THE COURT: I know it is.

MS. LABELLE: Your Honor, and that will include the fee, the entire fee blah that the Sixth Circuit sent down for them to raise this argument?

THE COURT: Yes. The rest of it I'll take under advisement, and this is, it's really a fairly complex and interesting question so –

MS. WARD: My last question, Your Honor, would the Court profit at all from additional briefing on the ripeness issue? Because I'm more than willing to do that, as well.

THE COURT: No.

(Proceedings Concluded *3:05* p.m.)

CERTIFICATE OF COURT REPORTER

I certify that the foregoing is a correct transcript from reported proceedings in the above-entitled matter.

s/Suzanne Jacques _____ 2/26/04 _____
SUZANNE JACQUES, CSR, RMR Date
Official Court Reporter
Eastern District of Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Bazetta, et. at.,

Plaintiffs,

Case No. 95-73540

v.

Honorable Nancy G. Edmunds

McGinnis, et. al.,

Defendants.
_____/

OPINION AND ORDER (1) DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; (2) GRANTING PLAINTIFFS' MOTION TO ENFORCE COMPLIANCE; AND (3) DENYING DEFENDANTS' MOTION TO PLACE ATTORNEY FEES IN ESCROW

This matter came before the Court on three motions: (1) Defendants' third motion for summary judgment; (2) Plaintiffs' motion to enforce compliance; and (3) Defendants' motion to place attorneys' fees in escrow. Defendants' motion for summary judgment is DENIED because the Supreme Court's ruling in this case did not overturn this Courts judgment as to Plaintiffs procedural due process claim. Plaintiffs' motion to enforce compliance is GRANTED. Defendants' motion to place attorneys' fees in escrow is DENIED.

I. Factual and Procedural Background

These motions arise out of Plaintiffs' objections to the following Michigan Department of Corrections

(MDOC) regulations governing non-contact prisoner visitations:

(a) Mich. Admin. Code Rule § 791.6609(9), defining what persons are in an inmate's immediate family;

(b) Mich. Admin. Code Rule § 791 .6609(2), limiting the number of visitors for a prisoner to an approved list often, not including immediate family and requiring visitors and immediate family members to be on a prisoner's list of approved visitors;

(c) Mich. Admin. Code Rule 791 .6609(2)(b), (5), and (6), restricting prisoner's access to minors, in that minors under the age of 18 are not permitted to visit unless they are the child, stepchild, or grandchild of the prisoner accompanied by an adult immediate family member or a legal guardian, and prohibiting a child to visit an incar parent if the prisoner parent's rights have been terminated;

(d) Mich. Admin. Code Rule 791.6609(7), prohibiting former prisoners from visiting unless they are the immediate family of a prisoner or unless prior approval for the visit is obtained from the warden of the institution where the visit will occur;

(e) Mich. Admin Code Rule 791.6609(11), permanently banning all visitation (other than attorneys or clergy) for prisoners with two or more major misconduct charges of controlled substance violations.

On April 19, 2001, following a bench trial, this Court granted judgment for Plaintiffs. *Bazzetta v. McGinnis,* 148 F. Supp. 2d 813 (E.D. Mich. 2001). This Court ruled that all of the contested regulations violated the prisoners' First Amendment rights. This

Court also held that the last rule, imposing a visitation ban for prisoners with two controlled substance violations, violated the Eight Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's procedural due process requirements. On appeal, the Sixth Circuit affirmed each of these conclusions.

On May 16, 2002, this Court issued an Order of Compliance directing the MDOC to comply with the terms of the Court's judgment, and specifically enjoined the MDOC from enforcing Rule 791.6609(2) or any rule, policy, or procedure which bans, restricts, prevents or limits visitation based on prior or future misconducts for controlled substance violations.

Following this Courts entry of judgment in favor of Plaintiffs, Plaintiffs moved for attorneys' fees as provided by statute. This Court granted Plaintiffs' motion after the Sixth Circuit affirmed the judgment. The Court granted the motion in two orders: an interim order dated June 27, 2002, which awarded $224,036.92 interim attorney fees, and an order dated August 19, 2002, which awarded the remaining $570,167.35 of requested fees, for a total of $794,204.27. Defendants paid Plaintiffs' attorneys the interim attorney fees, but posted a bond pending appeal of the second award.

The Supreme Court granted Defendants' petition for certiorari, limited to the following three questions:

> 1. Whether prisoners have a right to non-contact visitation protected by the First and Fourteenth Amendments.
>
> 2. Whether the restrictions on non-contact prison visitation imposed by the

> Michigan Department of Corrections are reasonably related to legitimate penological interests.
>
> 3. Whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections constitute cruel and unusual punishment in violation of the Eighth Amendment.

Overton v. Bazzetta, 123 S. Ct. 658 (2002).

The Supreme Court reversed the Sixth Circuit, ruling that none of the regulations facially violated the prisoners' First Amendment rights, and that the controlled substance violations did not facially violate the prisoners' Eighth Amendment rights. *Overton v. Bazzetta,* 123 S. Ct. 2162(2003). The Court neither granted certiorari nor actually decided whether the controlled substance regulations violated the prisoners' procedural due process rights.

On August 28, 2003, the Sixth Circuit issued an Order Vacating and Remanding, stating:

> In the above-styled case the Supreme Court of the United States on June 16, 2003, reversed the decision of this Court holding that certain Michigan prison regulations were invalid on their face, but also reserving any argument that "an individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards" would pass muster under the First and Eighth Amendments as incorporated by the Fourteenth Amendment. In light of the Supreme Court's holding in his case, the previous judgment of this Court is

vacated and the case remanded to the District Court for further consideration in light of the Supreme Court opinion.

In light of the Supreme Court's ruling, Defendants moved for the Sixth Circuit to reverse the May 16, 2002 Order of Compliance, but the Sixth Circuit denied their motion so that this Court could consider the validity of the order in the first instance.

II. Analysis

A. Defendants' Third Motion for Summary Judgment

Defendants move for summary judgment on Plaintiffs' procedural due process claims because (1) the Supreme Court implicitly rejected Plaintiffs' procedural due process argument, or in the alternative (2) Plaintiffs' procedural due process claim is moot.

The Supreme Court did not rule on Plaintiffs' due process argument, even though both this Court and the Sixth Circuit held that the permanent ban on visitation in response to two substance abuse violations violated prisoners' procedural due process rights. In fact, the Supreme Court did not grant its writ of certiorari on the due process issue, but instead the only questions before the Court were the First Amendment and Eighth Amendment issues. Therefore, this Court's decision that the regulation violates the prisoners' procedural due process rights is still valid.

Defendants also argue that this Court lacks subject matter jurisdiction over Plaintiffs' due process claims because this Court's May 16, 2002 Order of Compliance enjoined Defendants from enforcing the contested regulation or "any rule, policy or procedure

which bans, restricts, prevents or limits visitation based on prior or future misconducts for substance abuse." The MDOC removed all inmates from the visitation restriction list on May 17, 2002. After the Supreme Court's decision, the Department of Corrections reinstated the restriction on visitation based on two substance abuse violations. Defendants conclude that Plaintiffs' claims for injunctive and declaratory relief based on procedural due process violations became moot as of May 17, 2002.

Defendants' temporary lifting of the regulation in compliance with this Court's Order and their subsequent reinstatement of it does not render this controversy moot. The Supreme Court has held that:

> it is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.' '[I]f it did, the courts would be compelled to leave '[t]he defendant. . . free to return to his old ways.' In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'

Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., 528 U.S. 167, 708 (2000) (internal citations omitted).

More specifically, when an official agency removes an offending policy under court order pending

an appeal of the lower court's order, the case is not mooted.

> Temporary compliance with a decree pending appeal, for example, clearly should not moot a case, unless other circumstances show that official policies really have changed. It is equally easy to deny mootness if officials who have changed their practices warn that former practices may be resumed at any time, or if officials who have not changed their practices simply argue that they may change some day in the future.

13A Charles Allen Wright et al., Federal Practice and Procedure § 3533.7 (2d ed. 1984). *See also Ammex v. Cox,* F.3d —, No.01-2392 (6th Cir. December 3, 2003) (refusing to find that a withdrawn official action mooted the case). Therefore, Plaintiffs' procedural due process claims regarding the ban on visitation after two substance abuse violations are not moot.

In a case decided on December 3, 2003, the Sixth Circuit held that the Michigan Attorney General's withdrawal of a notice of intent to enforce a statute against the plaintiff did not moot the case, but that the case was no longer ripe. *Ammex v. Cox,* F.3d —, No. 01-2392 (6th Cir. December 3, 2003). The Court stated: "Where, as in this case, the statute at issue has not been enforced against Ammex, and indeed where a notice of intent to enforce has been explicitly withdrawn, the ripeness doctrine provides the appropriate analysis for determining whether this case should be heard at this time." *Id.* Even though neither party frames the issue as one of ripeness, *Ammex* indicates that it may be the most appropriate framework to analyze this issue.

A court should weigh three factors to determine if an issue is ripe for adjudication:

> One aspect of the "judicial fitness of the issues" is the extent to which the legal analysis would benefit from having a concrete factual context. The second aspect of the "judicial fitness of the issues" is the extent to which the enforcement authority's legal position is subject to change before enforcement. The third consideration deals with the "hardship to the parties of withholding court consideration."

Id.

In *Ammex*, the Sixth Circuit held that all three factors weighed against ripeness. First, the court found that factual development would enhance the court's review of the constitutionality of the challenged statutory scheme.

> Ammex is not challenging a specific rule or finding of the Michigan Attorney General, but rather the general applicability of a statutory scheme to its conduct. Analysis of any preemption or Commerce Clause issue would benefit from knowledge of just what was forbidden by the MCPA, and what the effects of the state's regulation would be on the policies underlying the Interstate and Foreign Commerce Clauses and the federal statutes relied upon by Ammex.

Second, the court found that there was a strong possibility that the agency would change its position, especially since it withdrew its notice of enforcement.

Third, the court did not find the hardship to the plaintiff in waiting was strong enough to outweigh the other two factors where there was no threat of criminal liability or huge immediate expense in temporary complying with the challenged statute.

Applying these three factors to the present case, Court concludes that this issue is ripe. First, there is no factual development needed to discover how the regulation will be implemented, since there was a full evidentiary hearing which established how it was implemented in the past. Second, there is no indication that the MDOC will change its position regarding the enforcement of the regulation, third, hardship to the prisoners to wait until their visitation rights are revoked is great: after the revocation, they will not be permitted any visitors until the parties meander through the legal process. The Court therefore denies Defendants' motion for summary judgment.

B. **Plaintiffs' Motion to Enforce Compliance**

On August 26, 2003, Defendants issued Director's Office Memorandum 2003-1 4, which, among other things, reinstated the permanent restrictions for substance abuse violations, stating:

> The Supreme Court decision also allows the, Department to again restrict visits for substance abuse misconducts, even if the misconduct is unrelated to a visit. Therefore, in accordance with Paragraph lEE of PD 05.03.140, a prisoner who is found guilty of the major misconduct violation of "Substance Abuse" for behavior which occurs on or after August 27, 2003 shall have his/her visits limited to non-contact for 30 days. In addition, Wardens shall recommend to the Director

> that the visits of a prisoner be permanently restricted in accordance with Paragraphs BBB through EEE of PD 05.03.140 if the prisoner has been found guilty of two or more major misconduct violations of "Substance Abuse" which do not arise from the same incidence Although the Supreme Court decision allows the Department to reinstate restrictions removed due to he lower courts' rulings, it has been decided that the restrictions will aQi be reinstated; however, recommendations shall be made to permanently restrict a prisoner's visits if his/her second or subsequent misconduct is based on behavior that occurs on or after September 1, 2003, regardless of when the first misconduct occurred.

(Attached as Supp. to Def. Third Mot. for Summ. J.)

This new DOM requires wardens to recommend a restriction regardless of when the first misconduct occurred. The original rules required both misconducts to have occurred after the rule's effective date. This change creates problems with notice because the first misconduct could have occurred before the rule was imposed, and problems with fairness because there can be years between the first and second substance abuse misconducts.

The new DOM also prohibits imposition of a second violation arising from the same incident. Plaintiffs argue that this new provision does not adequately address the Court's concern that the ban may be imposed for two incidents which were only hours apart and part of the same "pattern of behavior,"

because it is unclear how the MDOC defines "same incident."

On October 21, 2003, (after these motions were filed) Defendants issued DOM 2003- 15, which further modifies the rule imposing visitation restrictions for substance abuse violations. (Attached as P1. Reply to Def. Resp. in Opp. to P1. Mot. to Enforce Compliance, Ex. 1.) Plaintiffs claim that the new procedures fail to correct the significant procedural problems associated with the implementation of the permanent ban on visitations in the following ways:

(1) The policy still provides that the warden is to submit the recommendation to impose a permanent ban to the regional prison administrator who, in turn, forwards a recommendation to the deputy director. If the deputy director agrees that the restriction is warranted the recommendation shall be submitted to the director for a final determination. There are no criteria or time limits for the passing on any of the recommendations.

(2) There are no written criteria to guide the directors decision whether or not to impose the restriction.

(3) There is no hearing procedure for a prisoner to challenge the imposition of the ban, and there is no appeal procedure.

(4) DOM 2003-15 prohibits a warden from submitting a recommendation for removal of the restriction if a prisoner has a subsequent substance abuse misconduct or a non bondable misconduct. Thus, the new rule even further limits a warden's discretion. The warden has the discretion not to recommend removal of the restriction for any other reason, and there are not written standards which establish a

basis on which a prisoner can rely to ensure reinstatement.

(5) The new procedure requires that a warden make a recommendation for permanent restriction no more than fourteen days after the second or subsequent substance abuse misconduct guilty finding. Plaintiffs contend that this does not adequately resolve the problem of excessive time between a guilty finding and the imposition of the restrictions because there are no consequences should the warden fail to make the recommendation within fourteen days. There are also no time limits for when the recommendation, which is sent by the warden to the Regional Prison Administrator, must be forwarded from the RPA to the Deputy Director or when the Deputy Director must forward it to the Director and/or when the actual decision must be made by the Director.

This Court previously held that the rule deprived prisoners of their procedural due process rights by the "inconsistency and uncertainty of enforcement, the absence of any criteria for reinstatement, and the failure to provide any opportunity to be heard." 148 F. Supp. 2d at 858. Plaintiffs request the following procedural mechanisms be required to address the Court's procedural due process concerns:

(1) Written substantive criteria for imposing and lifting permanent visiting restrictions that are relevant to the stated purposed of reducing substance abuse;

(2) A clear decision-making process that identifies the official who is actually
responsible for making final decisions and insuring the restrictions are applied fairly and consistently;

(3) Time limits on the age of the misconducts that can be used to support a restriction;

(4) Limits on the time that can elapse between the second guilty finding and imposition of the restriction;

(5) Restricting imposition of visitation ban while underlying misconducts are being challenged through the appeal process;

(6) A hearing process before imposition of a permanent restriction to ensure that all criteria are met and no extenuating circumstances exist that warrant waiving the restriction or reducing its severity (e.g. by shortening its length, limiting it to non-contact visits, or limiting it to non-immediate family members), as occurs for individual visitor restrictions pursuant to PD 05.03.140, subsections OO-AAA;

(7) Adequate notice to the prisoner class before any misconduct findings can be used; and

(8) An appeal mechanism for the imposition of a permanent ban on visitation.

Plaintiffs also request that another rule be modified to comply with *Overton v. Bazzetta*. The rule limiting who can bring a child to visit an incarcerated parent states that a child must "be accompanied by an adult immediate family member or legal guardian" without indicating whether the adult must be an immediate family member of the child or the prisoner. The Supreme Court expressly interpreted the rule to permit visits if the child is "accompanied by an adult who is an immediate family member of the child or the inmate."

To ensure that the rules are not in fact inconsistent with the Supreme Court's findings, Plaintiffs request this Court to order Defendants to amend subsection KK of PD 05.03.140 to specify that eligible minor children may be accompanied by an adult who is an immediate family member of either the child or the prisoner.

Defendants contend that *Overton v. Bazzetta* rendered this Court's judgment unenforceable and that the Sixth Circuit recognized in its Order Vacating and Remanding and its October 24, 2003 Order (denying Defendants' motion to vacate this Court's order of compliance) that this Court's findings of fact and conclusions of law are no longer valid, and therefore cannot be enforced. Those Sixth Circuit orders, however, did not vacate this Court's judgment for Plaintiffs or otherwise render it invalid. Rather, the Sixth Circuit remanded the case to this Court "for further consideration in light of the Supreme Court opinion." (Order Vacating and Remanding at 2.) The Court therefore grants Plaintiffs' motion to enforce compliance and orders a conference with counsel on January 13, 2004 at 3:00 to discuss implementation of specific provisions.

C. Defendants' Motion to Place Attorney Fees in Escrow

On June 27, 2002, this Court ordered Defendants to pay Plaintiffs' "undisputed" interim attorney fees and costs. Defendants did not seek any rehearing of this order nor did they appeal it. It is the money paid pursuant to this order that Defendants move to place in escrow. On August 19, 2002, this Court granted Plaintiffs' Motion for Attorney Fees, awarding $570,167.35 in additional fees. Defendants appealed this second Order, and filed a supersedeas bond for $570,167.35 pending appeal. Following the

Supreme Court's decision, the Sixth Circuit remanded the appeal to this Court "for further consideration in light of the Supreme Court's opinion in *Overton v. Bazzetta,* 123 5. Ct. 2162 (2003)." Defendants argued in their briefs that Plaintiffs are not the prevailing parties, and that the attorney fees awarded to them should be placed in escrow pending final disposition of this matter.

In *Hensley v. Eckerhart,* 416 U.S. 424, 437 (1983), the Supreme Court provided the framework for determining attorney fee awards under Section 1988. First, as a threshold matter, a district court must determine whether the plaintiff is a "prevailing party." In this regard, the *Hensley* Court indicated that "[a] typical formulation is that 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit." *Id.* 461 U.S. at 433 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278 (1st Cir. 1978)). Once plaintiffs have crossed this threshold, they are considered a "prevailing party" within the meaning of Section 1988 and are entitled to a fee award of some kind. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist,* 489 U.S. 782, 791-92 (1989). As the Supreme Court explained, "[t]he degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award *vel non*." *Id.* at 793.

Based on this standard, it is apparent that Plaintiffs remain a prevailing party. They have prevailed on a number of significant issues including the procedural due process violation, their request for injunctive relief, expanded visits for minor children, and recognition of constitutional limits on prisoner visiting restrictions. Given the decision by the Supreme Court, however, it seems that there should be

some further consideration of the reasonableness of the attorney fees previously awarded. This issue must be briefed before the Court can rule.

With respect to the issue of escrow, the Court finds such a request to be untimely and unnecessary. Defense counsel missed their opportunity to request that the funds be put in escrow at the outset, and have cited no legal authority to support their argument that nearly eighteen months after money has been paid, the Court can order it into escrow.

The Court orders briefing on the issue of whether the amount of attorneys' fees should be reduced since Defendants prevailed at the Supreme Court on most of the issues except the procedural due process issue). In reconsidering the attorneys' fees, the Court will consider the entire amount of awarded fees, $794,204.27, not just the limited amount awarded in the August 19, 2002 appealed order.[1] The Court denies Defendants' motion for escrow.

---

[1]Plaintiffs contend that the interim fees paid pursuant to this Court's June 27, 2002 Order cannot now be placed in escrow as those fees were undisputed, Defendants never appealed that Order and that Order is not pending before this Court. Even so, the reasoning sup the interim fee award was included in Defendants' appeal of the Court's August 19, 2002 Order Granting Plaintiffs' Motion for Attorneys' Fees. That Order granted Plaintiffs' request only as to the total amount requested, $794,204.27, less the amount of the interim award of $224,036.92, which equaled $570,167.35. The Court awarded Plaintiffs the requested $570,167.35. Thus, Plaintiffs are correct that by appealing the August 19, 2002 award of $570,167.35, Defendants did not appeal the interim award of $224,036.92 since that award was not addressed in the Court's August 19, 2002 Order. But to

III. Conclusion

For the reasons stated above, the Court (1) denies Defendants' motion for summary judgment; (2) grants Plaintiffs' motion to enforce compliance; and (3) denies Defendants' motion to place attorney fees in escrow. The Court orders that counsel appear for a conference on January 13, 2004 at 3:00 to discuss implementation of the Court's prior orders and orders cross briefing on the issue of attorney fees by January 16, 2004.

s/Nancy Edmunds
Nancy G. Edmunds
U. S. District Judge

Dated: _____

---

deny any reconsideration of the interim award of attorneys' fees seems overly formalistic.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZZETTA, STACY BARKER, TONI BUNTON, DEBRA KING, SHANTE ALLEN, ADRIENNE BRANAUGH, ALESIA BUTLER, TAMARA PRUDE, SUSAN FAIR, VALERIE BUNTON and ARTURO BUNTON, through his Next Friend VALERIE BUNTON,

Plaintiffs,

v

KENNETH McGINNIS, DIRECTOR OF MICHIGAN DEPARTMENT OF CORRECTIONS; MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendants.

Case No. 95-73540

Hon. Nancy G. Edmunds

Deborah LaBelle (P31595)
Patricia Streeter (P30022)
Michael Barnhart (P10467)
Co-Counsel for Plaintiffs
221 N. Main, Suite 300
Ann Arbor, MI 48104
(734) 222-0088
(734) 213-3703

Lisa C. Ward
Co-Counsel for Defendants
1300 N. Waverly
Suite 1
Lansing, MI 48917
(517) 323-0300

Leo H. Friedman
Co-Counsel for Defendants
P.O. Box 30217
Lansing, MI 48909
(517) 335-7021

DEFENDANTS' SECOND MOTION TO PLACE ATTORNEY FEES IN ESCROW AND BRIEF IN SUPPORT

Defendants, through their attorney, Lisa C. Ward, Special Assistant Attorney General, hereby request that this Court enter an order requiring Plaintiffs to place all attorney fees and costs paid by Defendants pursuant to this Court's June 27, 2002 order, with interest, in an escrow account until such time as this Court has resolved the prevailing party issue.

1. On June 27, 2002, this Court entered its Order for Payment of Interim Attorney Fees, wherein it required Defendants to pay Plaintiffs $223,991.92 as a partial payment for attorney fees and costs in this case, while the parties litigated the remaining issues concerning Plaintiffs' motion for attorney fees. At the time of this Court's interim order, Defendants requested that the money being paid pursuant to the June 27, 2002 order be placed in an escrow account until such time as the United States Supreme Court ruled on Defendants' Petition for Writ of Certiorari. (See Attachment 1.)

2. After Defendants' June 17, 2002 request for an escrow account was ignored, on July 8, 2002, Plaintiffs received checks from Defendants in the following amounts: Deborah LaBelle received $102,154.68; Michael Barnhart received $63,173.11; Patricia Streeter received $38,750.34; and Barbara Levine received $35,582.70. (See Attachment 2.) In addition, on August 19, 2002, this Court also entered its Order Granting Plaintiffs' Motion for Attorney Fees and ordered Defendants to pay Plaintiffs an additional amount of $570,167.35. Defendants timely filed a notice of appeal regarding the Court's August 19, 2002 order on August 28, 2002.

3. As this Court is already aware, on October 24, 2003, the United States Court of Appeals for the Sixth Circuit issued an Order remanding Defendants' appeal of this Court's August 19, 2002 Order Granting Plaintiffs' Motion for Attorney Fees for further consideration of the prevailing party issue in light of the Supreme Court's unanimous reversal of the lower court orders in *Overton v Bazzetta*, 123 S Ct 2162 (2003). On October 31, 2003, Defendants filed a motion requesting that this Court order Plaintiffs to place all attorney fees and costs paid by Defendants pursuant to this Court's prior orders, with interest, in an escrow account until such time as the Court has resolved the prevailing party issue. Defendants' motion was denied by this Court on December 23, 2003. However, on January 21, 2005, this Court granted Defendants' motion to hold all attorney fees in abeyance.

4. Subsequently, on November 28 2005, the Sixth Circuit issued an Amended Opinion and an Amended Judgment, wherein the Court determined that Plaintiffs' procedural due process claim was foreclosed by the Supreme Court's decision in *Overton, supra*, and it reversed and remanded this case for further proceedings. Thus, after ten long years, Defendants have prevailed with regard to every single claim at issue in Plaintiffs' Third Amended Complaint. Given that Plaintiffs are not the prevailing parties in this case on any issue, they are no longer entitled to attorney fees pursuant to 42 USC 1988. Therefore, Defendants request that any money paid to Plaintiffs pursuant to this Court's June 27, 2002 order, including interest, be placed in an escrow account until such time as this Court has resolved the prevailing party issue.

WHEREFORE, for the above-stated reasons, Defendants hereby request that this Court enter an

order requiring Plaintiffs to place all attorney fees and costs paid by Defendants pursuant to this Court's June 27, 2002 order, with interest, in an escrow account until such time as this Court has resolved the prevailing party issue.

Respectfully submitted,

Michael A. Cox
Attorney General

s/Leo H. Friedman
Assistant Attorney General
Co-Counsel for Defendants
Corrections Division
P.O. Box 30217
Lansing, MI 48909
(517) 335-7021
friedmanl@michigan.gov
(P26319)

Lisa C. Ward (P38933)
Special Assistant Attorney General
Co-Counsel for Defendants
1300 North Waverly, Suite 1
Lansing, MI 48917
(517) 323-0300

Dated: January 6, 2006

Friedman/Bazzetta/1995052460A/Pldgs/Mot Atty Fees Escrow2

CERTIFICATE OF SERVICE: I certify that on January 6, 2006, I electronically filed Defendants' Second Motion to Place Attorney Fees in Escrow and Brief in Support with the Clerk of the Court using the ECF system. Counsel for Plaintiffs are served electronically via the ECF System.

s/ Leo H. Friedman (P26319)
Assistant Attorney General
PO Box 30217
Lansing, MI 48909
Phone: (517) 335-7021
Email: friedmanl@michigan.gov

ATTACHMENTS TO DEFENDANTS' SECOND MOTION TO PLACE ATTORNEY FEES IN ESCROW AND BRIEF IN SUPPORT

1. June 17, 2002 letter to Deborah LaBelle from Defendants' counsel requesting an escrow account be set up for attorney fees and costs and the Court's June 27, 2002 Order for Payment of Interim Attorney Fees.

2. July 8, 2002 letters to Plaintiffs' counsel enclosing checks pursuant to the Court's June 27, 2002 Order.

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

WILLIAM J. RICHARDS
Deputy Attorney General

P.O. Box 30217
LANSING, MICHIGAN 48909

JENNIFER MULHERN GRANHOLM
ATTORNEY GENERAL

June 17, 2002

VIA FACSIMILE
AND U.S. MAIL

Deborah LaBelle
Attorney at Law
221 N. Main Street, Suite 300
Ann Arbor, Michigan 48104

Dear Ms. LaBelle:

Re: *Bazzetta v. McGinnis*
USDC-ED No. 95-CV-73540-DT

I am writing as a follow-up to the Court's discussion of June 13, 2002 regarding an interim order of attorney fees and costs. Based on a review of Mr. Schratz's May 14, 2002 Declaration, Defendants are prepared to agree to the following:

1. Defendants will send the Court a check in the amount of $223,991.92, which represents the attorney fees and costs that are not in dispute.

2. Defendants request that this money be placed in an escrow account by the Court until such time as the United States Supreme Court has ruled on Defendants' Petition For Writ Of Certiorari.

Defendants submit that this proposal is the only way to insure that, in the event Defendants prevail in their appeal to the Supreme Court, the taxpayers of the State of Michigan are reimbursed for any attorney fees and costs wrongly paid to Plaintiffs. Please let me know immediately if this proposal is satisfactory to Plaintiffs.

Very truly yours,

Leo H. Friedman
Assistant in Charge
Corrections Division

Lisa C. Ward
Special Assistant Attorney General

LCW/mz
c: Hon. Nancy G. Edmunds
Friedman/1995052460A/corr/La Belle 061702

Attachment 1

*** Transmit Conf. Report ***

P.1 Jun 17 '02 15:17

Telephone Number	Mode	Start	Time	Pages	Result	Note
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STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

WILLIAM J. RICHARDS
Deputy Attorney General

P.O. Box 30217
LANSING, MICHIGAN 48909

JENNIFER MULHERN GRANHOLM
ATTORNEY GENERAL

FAX COVER SHEET

DATE: June 17, 2002

TO: Deborah LaBelle
Attorney at Law

FAX NO: (734) 769-2196

FROM: Lisa C. Ward
Special Assistant Attorney General
Corrections Division

OUR PHONE: (517) 335-7021
OUR FAX: (517) 335-7157

No. of pages, including cover page: 2

RE: Bazzetta v. McGinnis, et al
USDC Docket No: 95-cv-73540-DT

COMMENTS: Letter dated 6/17/02 to D. LaBelle from L. Ward. Original will follow via U.S. Mail.

ATTY GEN CORR :517-335-7157 -126a-

*** Transmit Conf.Report ***

P.1

Jun 17 '02 15:18

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STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

WILLIAM J. RICHARDS
Deputy Attorney General

P.O. Box 30217
LANSING, MICHIGAN 48909

JENNIFER MULHERN GRANHOLM
ATTORNEY GENERAL

FAX COVER SHEET

DATE: June 17, 2002

TO: Honorable Nancy G. Edmunds
U.S. District Court
for the Eastern District of Michigan

FAX NO: (313) 234-5393

FROM: Lisa C. Ward
Special Assistant Attorney General
Corrections Division

OUR PHONE: (517) 335-7021
OUR FAX: (517) 335-7157

No. of pages, including cover page: 2

RE: Bazzetta v. McGinnis, et al
USDC Docket No: 95-cv-73540-DT

COMMENTS: Letter dated 6/17/02 to D. LaBelle from L. Ward. Original will follow via U.S. Mail

ATTORNEY GENERAL
CORRECTIONS DIVISION
JUL 02 2002
ASSIGNED TO:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZZETTA, et al.,

Plaintiffs,

v.

KENNETH McGINNIS, et al.,

Defendants.
_____/

Honorable Nancy G. Edmunds

Case No: 95-CV-73540-DT

FILED
JUN 27 2002
CLERKS OFFICE
U.S. DISTRICT COURT
EASTERN MICHIGAN

ORDER FOR PAYMENT OF INTERIM ATTORNEYS FEES

This matter having come before the Court on Plaintiffs' request for payment of undisputed attorney fees and costs and the court having reviewed the parties' pleadings and heard oral argument thereon;

IT IS HEREBY ORDERED that, pending resolution of Plaintiffs' petition for attorney fees and costs, Defendants' shall make payment of those attorney fees and costs that are not in dispute;

IT IS FURTHER ORDERED that Defendants shall make the following payments, which represent the undisputed attorney fees and costs in this matter, within fourteen (14) days of entry of this Order, together with interest from April 25, 2001, the date of judgement in this case:

To Deborah LaBelle: $95,475.74	To Patricia Streeter: $36,216.80
To Michael Barnhart: $59,043.38	To Barbara Levine $33,256.00

IT IS SO ORDERED this day of , 2002.

NANCY G. EDMUNDS

United States District Court Judge

A TRUE COPY
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
BY DEPUTY CLERK

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

WILLIAM J. RICHARDS
Deputy Attorney General

P.O. Box 30217
LANSING, MICHIGAN 48909

JENNIFER MULHERN GRANHOLM
ATTORNEY GENERAL

July 8, 2002

Deborah LaBelle
Attorney at Law
221 N. Main Street, Suite 300
Ann Arbor, MI 48104

Dear Ms. LaBelle:

Re: *Bazzetta v. McGinnis*
USDC-ED No. 95-CV-73540-DT

Enclosed pursuant to the Court's Order of June 27, 2002, is a check for attorney fees in the amount of $102,154.68.

Very truly yours,

Mark Matus IKS

Mark W. Matus
Assistant Attorney General
Corrections Division

MWM:kjs
Enclosure

Friedman/1995052460A/corr/Ltr LaBelle 070802

Attachment 2

006788

000 214582393

PAGE 1 OF 1

STATE OF MICHIGAN REMITTANCE ADVICE

INVOICE NUMBER	INVOICE DATE	INVOICE DESCRIPTION	REF. DOC.	CURRENT DOC.	AMOUNT
488 472 DEPT of CORR-FISC SMT (517)373-3600					
95-CV-73540-DT		M.RAZZETTA V K. MCGINNIS,ET AL		WI101839	$ 102,154.68

WARRANT AMOUNT $ 102,154.68

DETACH HERE - RETAIN STUB FOR YOUR RECORDS - DETACH HERE

JOHN ENGLER, GOVERNOR

000 214582393

STATE OF MICHIGAN

VENDOR NO.	MC	488 AGENCY	000 BANK ID	020708 ACCTG	07/08/2002	7470 724

ONE HOND TWO THOUS ONE HUND FIFTY-FOUR & 68/100 **********DOLLARS $***102,154.68

006788

DEBORAH LABELLE
221 N. MAIN ST STE 300
ANN ARBOR MI 48104

DOUGLAS B. ROBERTS, STATE TREASURER

214582393" :072400706: 000"

PLEASE REMOVE THIS PORTION BEFORE CASHING

BEST AVAILABLE COPY

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

WILLIAM J. RICHARDS
Deputy Attorney General

P.O. Box 30217
LANSING, MICHIGAN 48909

JENNIFER MULHERN GRANHOLM
ATTORNEY GENERAL

July 8, 2002

Michael Barnhart
Attorney at Law
615 Griswold Street, Suite 925
Detroit, MI 48226

Dear Mr. Barnhart:

Re: *Bazzetta v. McGinnis*
USDC-ED No. 95-CV-73540-DT

Enclosed pursuant to the Court's Order of June 27, 2002, is a check for attorney fees in the amount of $63,173.11.

Very truly yours,

Mark Matus /KS

Mark W. Matus
Assistant Attorney General
Corrections Division

MWM:kjs
Enclosure

Frieclosure/1995052460A/corr/Ltr Barnhart 070802

000 214582395

006790

PAGE 1 OF 1

STATE OF MICHIGAN REMITTANCE ADVICE

INVOICE NUMBER	INVOICE DATE	INVOICE DESCRIPTION	REF. DOC.	CURRENT DOC.	AMOUNT
488 472 DEPT OF CORR-FISC MGMT (517)373-3800					
95-CV-73540-DT		M.BAZZETTA V K. NOGERRIS,ET AL		YP209643	$ 63,173.11

WARRANT AMOUNT $ 63,173.11

NON-NEGOTIABLE NON-NEGOTIABLE NON-NEGOTIABLE

NON-NEGOTIABLE NON-NEGOTIABLE NON-NEGOTIABLE

DETACH HERE - RETAIN STUB FOR YOUR RECORDS - DETACH HERE

JOHN ENGLER, GOVERNOR 000 214582395

STATE OF MICHIGAN

488 (VENDOR NO.) MC (AGENCY) 020708 (BANK I.D. ACCT#) 07/08/2002

SIXTY-THREE THOUS ONE HUND SEVENTY-THREE & 11/100 ******DOLLARS $****63,173.11

006790

MICHAEL BARNHART
615 GRISWOLD ST STE 925
DETROIT MI 48226

VOID VOID VOID

DOUGLAS ROBERTS, STATE TREASURER

214582395" :072400706: 000"

PLEASE REMOVE THIS PORTION BEFORE CASHING

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STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

WILLIAM J. RICHARDS
Deputy Attorney General

P.O. BOX 30217
LANSING, MICHIGAN 48909

JENNIFER MULHERN GRANHOLM
ATTORNEY GENERAL

July 8, 2002

Patricia A. Streeter
Attorney at Law
221 N. Main Street, Suite 300
Ann Arbor, MI 48104

Dear Ms. Streeter:

Re: *Bazzetta v. McGinnis*
USDC-ED No. 95-CV-73540-DT

Enclosed pursuant to the Court's Order of June 27, 2002, is a check for attorney fees in the amount of $38,750.34.

Very truly yours,

Mark Matus /KS

Mark W. Matus
Assistant Attorney General
Corrections Division

MWM:kjs
Enclosure

Friedman/1995052460A/corr/Ltr Streeter 070802

000 214582394

006789

PAGE 1 OF 1

STATE OF MICHIGAN REMITTANCE ADVICE

INVOICE NUMBER	INVOICE DATE	INVOICE DESCRIPTION	REF. DOC.	CURRENT DOC.	AMOUNT
468 472 DEPT OF CORR-FISC MGMT (517)373-3800					
95-CV-73560-DT		M.GAZZETTA V K.MCGINNIS,ET AL		VP109661	$ 38,750.34

WARRANT AMOUNT $ 38,750.34

NON-NEGOTIABLE NON-NEGOTIABLE NON-NEGOTIABLE

DETACH HERE - RETAIN STUB FOR YOUR RECORDS - DETACH HERE

JOHN ENGLER, GOVERNOR 000 214582394

STATE OF MICHIGAN

PLEASE REMOVE THIS PORTION BEFORE CASHING

VENDOR NO. | MO | 468 AGENCY | 000 BANK I.D. | 0207068 ACCT.# | 07/08/2002 | 74-70 711

THIRTY-EIGHT THOUS SEVEN HUND FIFTY & 34/100 **********DOLLARS $****38,750.34

006789

PATRICIA STREETER
221 N. MAIN ST STE 300
ANN ARBOR MI 48104

ORDER OF:

DOUGLAS B. ROBERTS, STATE TREASURER

214582394" :072400706: 000"

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000 214582402

PAGE 1 OF 1

STATE OF MICHIGAN REMITTANCE ADVICE

INVOICE NUMBER	INVOICE DATE	INVOICE DESCRIPTION	REF. DOC.	CURRENT DOC.		AMOUNT
488 472 DEPT OF COR-FISC MGMT (517)373-3800						
95-CV-75540-DT		M.BAZZETTA V K.MOSHERES, ET AL		WP209844	$	35,582.70

WARRANT AMOUNT $ 35,582.70

NON-NEGOTIABLE NON-NEGOTIABLE NON-NEGOTIABLE

NON-NEGOTIABLE NON-NEGOTIABLE NON-NEGOTIABLE

DETACH HERE - RETAIN STUB FOR YOUR RECORDS - DETACH HERE

JOHN ENGLER, GOVERNOR

000 214582402

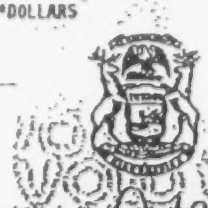
STATE OF MICHIGAN

VENDOR NO	HC	488 AGENCY	000 BANK ID	020708 ACCTG	07/08/2002

THIRTY-FIVE THOUS FIVE HUND EIGHTY-TWO & 70/100 ********DOLLARS $****35,582.70

006791

BARBARA LEVINE
PO BOX 420
GRAND LEDGE MI 48837



VOID

DOLLARS

STATE TREASURER & WARRANT

!14582402#:072400706#: 000#

PLEASE REMOVE THIS PORTION BEFORE CASHING

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZETTA, et al.,

Plaintiffs,

V.

KENNETH McGINNIS, et al.,

Defendants.
_____/

CIVIL NO. 95-73540
HON. NANCY G. EDMUNDS

ORDER DENYING DEFENDANTS' SECOND MOTION TO PLACE ATTORNEY FEES IN ESCROW [397]

This matter came before the Court on Defendant's second motion to place attorney fees in escrow [397]. The Court having read the motion and brief, and Plaintiffs' response and being fully advised in the premises;

IT IS ORDERED that the motion is DENIED for the reasons set forth in the Plaintiffs' brief.

s/Nancy G. Edmunds
Nancy G. Edmunds
United States District Judge

Dated: September 20, 2006

I hereby certify that a copy of the foregoing document was served upon counsel of record on September 20, 2006, by electronic and/or ordinary mail.

s/Carol A. Hemever
Case Manager

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

October 10, 2006

Mr. Thomas L. Casey
Solicitor General
Office of the Attorney General
P.O. Box 30212
Lansing, MI 48909

Re: Michelle Bazzetta, et al.
v. Patricia L. Caruso, Director, Michigan Department of Corrections, et al.
No. 05-1572

Dear Mr. Casey:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZZETTA, STACY BARKER, TONI BUNTON, DEBRA KING, SHANTE ALLEN, ADRIENNE BRANAUGH, ALESIA BUTLER, TAMARA PRUDE, SUSAN FAIR, VALERIE BUNTON and ARTURO BUNTON, through his Next Friend VALERIE BUNTON,

Plaintiffs,

v

KENNETH McGINNIS, DIRECTOR OF MICHIGAN DEPARTMENT OF CORRECTIONS; MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendants.

Case No. 95-73540

Hon. Nancy G. Edmunds

Deborah LaBelle (P31595)
Patricia Streeter (P30022)
Michael Barnhart (P10467)
Co-Counsel for Plaintiffs
221 N. Main, Suite 300
Ann Arbor, MI 48104
(734) 222-0088
(734) 213-3703

Lisa C. Ward
Co-Counsel for Defendants
1300 N. Waverly
Suite 1
Lansing, MI 48917
(517) 323-0300

Leo H. Friedman
Co-Counsel for Defendants
P.O. Box 30217
Lansing, MI 48909
(517) 335-7021

CERTIFICATE OF SERVICE

I hereby certify that on October 13,2006, I electronically filed Defendants' Reply in Opposition to Plaintiffs' Request for Attorney Fees with the Clerk of the Court, using the ECF System. Counsel for Plaintiffs are also served via the ECF System.

s/Lisa C. Ward
Co-Counsel for Defendants
Special Assistant Attorney General
1300 N. Waverly, #1
Lansing, MI 48917
(517) 323-0300
LisaCWard@aol.com
P38933

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZZETTA, STACY BARKER, TONI BUNTON, DEBRA KING, SHANTE ALLEN, ADRIENNE BRANAUGH, ALESIA BUTLER, TAMARA PRUDE, SUSAN FAIR, VALERIE BUNTON and ARTURO BUNTON, through his Next Friend VALERIE BUNTON,

Plaintiffs,

v

KENNETH McGINNIS, DIRECTOR OF MICHIGAN DEPARTMENT OF CORRECTIONS; MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendants.

Case No. 95-73540

Hon. Nancy G. Edmunds

Deborah LaBelle (P31595)
Patricia Streeter (P30022)
Michael Barnhart (P10467)
Co-Counsel for Plaintiffs
221 N. Main, Suite 300
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(734) 213-3703

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Lansing, MI 48917
(517) 323-0300

Leo H. Friedman
Co-Counsel for Defendants
P.O. Box 30217
Lansing, MI 48909
(517) 335-7021

DEFENDANTS' REPLY IN OPPOSITION TO PLAINTIFFS' REQUEST FOR ATTORNEY FEES

INTRODUCTION

Defendants, through their attorney, Lisa C. Ward, Special Assistant Attorney General, hereby file their reply to Plaintiffs' Brief in Response to Court Order of October 1,2006. For the reasons set forth more fully below, Defendants contend that Plaintiffs are not entitled to any attorney fees and costs because they have not prevailed on any issue in this case.

BACKGROUND FACTS

As this Court is already well aware, in 1995, Plaintiffs filed a civil sights action pursuant to 42 USC *5* 1983 in this Court. Plaintiffs alleged that MDOC's 1995 visitation policy deprived them of their sights to privacy and family integrity, freedom of association, due process and to be free of cruel and unusual punishment in violation of the First, Eighth and Fourteenth Amendments to the United States Constitution. In their complaint, Plaintiffs sought declaratory, preliminary and permanent injunctive relief; however, they did not seek monetary damages.

On June 16,2003, the United States Supreme Court unanimously reversed the April 10, 2002 Opinion of the United States Court of Appeals for the Sixth Circuit,[1] in its entirety.[2] In its decision, the Supreme Court held that MDOC's 1995 prison visitation restrictions, as they pertain to non-contact visits, did not violate the First, Eighth, or Fourteenth Amendments to the United States Constitution. On August 28, 2003, in accordance with the Supreme

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[1] *Bazzetta v McGinnis,* 386 F3d 311 (CA 6 2002).

[2] *Overton v Bazzetta,* 539 US 126 (2003).

Court's decision, the Sixth Circuit vacated its decision affirming this Court's April 19, 2001 Findings of Fact and Conclusions of Law,[3] and remanded the case back to this Court for further consideration in light of the Supreme Court's decision in *Overton.*[4]

Subsequently, on September 13, 2005, the Sixth Circuit reversed this Court's December 23, 2003 opinion and order denying Defendants' motion for summary judgment regarding the procedural due process issue and granting Plaintiffs' motion to enforce compliance of the May 16, 2002 Order of Compliance.[5] In its decision, the Sixth Circuit noted that, although the Supreme Court did not grant certiorari on the procedural due process issue, based on its analysis of the unusual component of the Eighth Amendment's prohibition against cruel and unusual punishment and its determination that MDOC's substance abuse visitation restriction policy was not a "dramatic departure from acceptable standards for conditions of confinement," the Supreme Court implicitly ruled that inmates in Michigan do not have a liberty interest in prison visitation.[6]

Plaintiffs' Petition for Rehearing with Suggestion for En Banc Review was filed in the Sixth Circuit on September 26, 2005. After Defendants timely filed a response opposing Petitioners' petition, on November 28,2005, the Sixth Circuit issued an Amended opinion.[7] A review of the Sixth Circuit's Amended Opinion reveals that the only substantive

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[3] *Bazzetta v McGinnis,* 148 F Supp 2d 813 (ED Mich 2001).

[4] *Overton,* 539 US 126.

[5] *Bazetta v McGinnis,* 423 F 3d 557 (CA 6 2005).

[6] *Overton,* 539 US 126, and *Sandin v Conner,* 515 US 472 (1995).

[7] *Bazzetta v McGinnis,* 430 F 3d 795 (CA 6 2005).

change from its September 13, 2005 Opinion was in the conclusion.[8] In its Amended Opinion, the Sixth Circuit clarified that the Supreme Court's decision in *Overton,*[9] foreclosed Plaintiffs' procedural due process claim, and therefore, this Court abused its discretion when it refused to dissolve its May 16, 2002 Order of Compliance. The Sixth Circuit's Order denying Plaintiffs' petition for rehearing en banc and petition for rehearing was entered on March 9, 2006. Plaintiffs' Petition for Writ of Certiorari was denied by the Supreme Court on October 10, 2006. (Exhibit 1). Given that the Supreme Court has denied Plaintiffs Petition For Writ Of Certiorari on the procedural due process issue and Defendants have prevailed on every issue in this case, this Court has no authority to grant Plaintiffs any attorney fees and costs pursuant to 42 USC § 1988.

ARGUMENT

I. This Court Lacks Authority to Award Plaintiffs Attorney Fees and Costs.

In this case, Plaintiffs' Third Amended Complaint was filed pursuant to 42 USC § 1983. However, as this Court is aware, 42 USC § 1983, by itself, does not provide this Court with jurisdiction to decide this case. "Standing alone, § 1983 clearly provides no protection for civil rights since, as we have just concluded, § 1983 does not provide for any substantive rights at all."[10] Rather, it is 28 USC § 1343(3) that provides this Court with jurisdiction to decide a case brought to redress the deprivation of rights secured by the Constitution of

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[8] *Bazzetta,* 430 F 3d at 805.

[9] *Overton,* 539 US 126.

[10] Chapman v Houston Welfare Rights Org, 441 US 600, 617-618 (1979); Hagans v Lavine, 415 US 528 (1974).

the United States or by an Act of Congress providing for equal rights.[11] With regard to the claims at issue in this case, there is absolutely no dispute that Plaintiffs' Third Amended Complaint does not contain any allegations concerning equal protection violations. In addition, as a result of *Overton,*[12] Plaintiffs can not establish that Defendants deprived them of rights protected by the United States Constitution.

The Supreme Court has also ruled that 42 USC § 1988, on its own, does not provide this Court with jurisdiction to award attorney fees. "This interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim."[13]

Therefore, in order for this Court to have jurisdiction to award any attorney fees and costs to counsel for Plaintiffs, Plaintiffs have to meet the jurisdictional requirements of 28 USC § 1343(3), and establish that they prevailed on at least one of their claims that Defendants' actions deprived them of a right secured by the Constitution of the United States. A review of the record in this case reveals that Plaintiffs have failed to prevail on any claim that the 1995 visitation restrictions violated their constitutional rights. Thus, this Court lacks authority under 28 USC § 1343(3) to award Plaintiffs any attorney fees and costs.

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[11] *Chapman,* 441 US at 618.

[12] *Overton,* 539 US 126.

[13] *Lewis v Continental Bank Corp,* 494 US 472, 480 (1990). See *Moor v County of Almeda,* 411 US 693 (1973).

II. Plaintiffs Did Not Obtain Any Relief to Entitle Them to Attorney Fees and Costs.

In their brief, Plaintiffs take the position that they are entitled to attorney fees and costs in this case as a result of a change in the rules to allow minor siblings to visit their incarcerated brothers and sisters. Although on May 24, 2001, Public Act 8 of 2001, which gives MDOC authority to permit the minor siblings of an inmate to participate in prison visitation was signed into law, Plaintiffs' argument totally ignores the recent Supreme Court holding in *Buckhannon Bd v W Va Dept of Health & Human Res.*[14] In *Buckhannon,* the Supreme Court held that the "catalyst theory" was not a permissible basis for an award of attorney fees. Thus, even if this Court were to assume that Plaintiffs' lawsuit was the basis for the 2001 statutory change allowing minor siblings to participate in prison visitation, Plaintiffs are not the prevailing party in this case, and therefore, they are not entitled to attorney fees.

Plaintiffs also attempt to argue that because at different points during this eleven year controversy, Defendants were prohibited by this Court's orders from fully implementing its 1995 prison visitation restrictions, they have prevailed on a significant issue in thus case. A review of the cases cited by Plaintiffs to support their position reveals that Plaintiffs' argument is without merit. None of the cases cited by Plaintiffs involve the situation presented in this case, namely that Plaintiffs have not prevailed on any constitutional claim. With regard to the only Sixth

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[14] *Buckhannon Bd v W Va Dept of Health & Human Res,* 532 598 (2001).

Circuit case cited by Plaintiffs, *Webster v Sowders*,[15] the Sixth Circuit held that the plaintiffs' success was merely a procedural victory and thus, plaintiffs were not entitled to attorney fees. Defendants submit that the temporary injunctive relief that Plaintiffs obtained during this litigation was merely a procedural success to maintain the status quo, and not actual relief on the merits of their claims. Therefore, given that Plaintiffs have not prevailed on any issue in this case, they are not entitled to attorney fees pursuant to 42 USC § 1988, and 28 USC § 1343(3).

RELIEF

WHEREFORE, for the above-stated reasons, Defendants respectfully request that this Court enter an order vacating its June 27, 2002 Order for Payment of Interim Attorney Fees; vacating its August 19, 2002 Order Granting Plaintiffs' Motion for Attorney Fees; and requiring Plaintiffs' counsel to repay all attorney fees and costs paid by Defendants to date, including interest within thirty days.

Respectfully submitted,

Michael A. Cox
Attorney General

Leo H. Friedman
Assistant Attorney General
Corrections Division
P.O. Box 30217
Lansing, MI 48909
(517) 335-7021
FriedmanL@michigan.gov
P26319

---

[15] *Webster v Sowders*, 845 F 2d 1032, 1036-1037 (CA 6 1988).

s/Lisa C. *Ward*
Special Assistant Attorney General
1300 N. Waverly, #1
Lansing, MI 48917
(517) 323-0300
LisaCWard@aol.com
P38933

Dated: October 13,2006

Friedman/Bazzetta/1995052460A/Pldgs/Reply Opp to Pls' Req for Atty Feed 101306

MICHELLE BAZZETTA, et al v KENNETH McGINNIS
United States District Court, Eastern District No. 95-73540
Honorable Nancy G. Edmunds

INDEX OF EXHIBITS

1. Docket Sheet for *Bazzetta, et al v Caruso, et al,* U.S. Supreme Court No. 05-1572.

MICHELLE BAZZETTA, et al v KENNETH McGINNIS
United States District Court, Eastern District No. 95-73540
Honorable Nancy G. Edmunds

EXHIBIT 1

No. 05-1572
Title: Michelle Bazzetta, et al., Petitioners
v.
Patricia L. Caruso, Director, Michigan Department of Corrections, et al.
Docketed: June 8, 2006
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (04-1823)
Decision Date: November 28, 2005
Rehearing Denied: March 9, 2006

Date	Proceedings and Orders
Jun 6 2006	Petition for a writ of certiorari filed. (Response due July 10, 2006)
Jun 28 2006	Order extending time to file response to petition to and including August 9, 2006.
Aug 9 2006	Order further extending time to file response to petition to and including September 8, 2006.
Sep 7 2006	Brief of respondents Patricia L. Caruso, Director, Michigan Department of Corrections, et al. in opposition filed.
Sep 20 2006	DISTRIBUTED for Conference of October 6, 2006.
Oct 10 2006	Petition DENIED.

Name	Address	Phone
Attorneys for Petitioners:		
Deborah LaBelle	221 N. Main Street Suite 300 Ann Arbor, MI 48104	(734) 996-5620
Party name: Michelle Bazzetta, et al.		
Attorneys for Respondents:		
Thomas L. Casey	Solicitor General Office of the Attorney General P.O. Box 30212 Lansing, MI 48909	(517) 373-1124
Party name: Patricia L. Caruso, Director, Michigan Department of Corrections, et al.		

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE BAZZETTA, et al.,

Plaintiffs,

v.

KENNETH McGINNIS, et al.,

Defendants.
_____/

Case No. 95-73540

Honorable Nancy G. Edmunds

JUDGMENT

The Court having reviewed the pleadings in this matter and being fully advised in the premises;

IT IS HEREBY ORDERED AND ADJUDGED that Defendants' motion for entry of Judgment is hereby GRANTED, and the case is DISMISSED.

SO ORDERED.

s/NANCY G. EDMUNDS
Nancy G. Edmunds
U.S. District Judge

Dated: November 20, 2006

I hereby certify that a copy of the foregoing document was served upon the parties an/or counsel of record on November 20, 2006, by electronic and/or ordinary mail.

s/Carol A. Hemeyer
Case Manager